IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

MARK L. EVANS
ANTHONY A. LAPHAM
DONALD S. BURRIS
PHILIP J. HARTER

734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS

162 Old Town Road
East Setauket, New York 11733

Attorneys for Amicus Curiae Environmental Defense Fund

SHEA & GARDNER
Of Counsel

Washington, D. C. · THIEL PRESS · 202 · 393-0625

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

STATUTES AND REGULATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

INTEREST OF THE ENVIRONMENTAL DEFENSE FUND

The Environmental Defense Fund (EDF) is a non-profit, public-benefit corporation organized under the laws of the State of New York. Its nationwide membership of 21,000 includes scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among EDF's primary objectives is "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best

promote a quality environment" [Bylaws, Art. 1:2(d)]. EDF's "social action" includes education, research, and—when necessary "to prevent * * * environmental degradation"—legal action, which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that might otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as one of the nation's most effective and responsible litigants in this important field.

EDF has a vital interest in the outcome of this case. First, if the Ninth Circuit's view on standing were adopted

[1] See, *e.g.*, *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dep't of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260 (E.D. Ark. 1971) (Gillham Dam); *Environmental Defense Fund, Inc. v. Montrose Chemical Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1173 (D.D.C. 1971) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Hardin*, 2 BNA Env. Rep. Cas. 1425 (D.D.C. 1971) (Mirex); *Wilderness Society, Inc. v. Hickel*, 1 BNA Env. Rep. Cas. 1335 (D.D.C. 1970) (trans-Alaska pipeline); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed August 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, 1 BNA Env. Rep. Cas. 1640 (D. Mont. 1970) (paper mill discharges). EDF has also filed petitions and/or been heard as a party in proceedings before numerous federal agencies, including the Atomic Energy Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Power Commission, the Federal Trade Commission, and the National Forest Service.

by this Court, doubt would be cast on the ability of EDF to accomplish its objectives through litigation in the federal courts where it considers such litigation necessary to protect our natural environment. Second, EDF has an important organizational commitment to promoting the proper conduct of federal officials in decisions that affect public lands.

Petitioner and respondents have consented to the filing of this brief.[2]

STATEMENT OF THE CASE

The Sierra Club, a non-profit California corporation, brought this action to enjoin the issuance of federal permits for the development of a large private resort in the Mineral King Valley—located in the Sequoia National Game Refuge area of Sequoia National Forest—and the construction of an access road through the Sequoia National Park. In its motion for preliminary injunction the Sierra Club asserted that the threatened action would permanently destroy natural values of public lands and would irreparably harm the public interest in conserving those values. It alleged that the Secretary of the Interior would exceed his authority by authorizing the construction of the new highway and the installation of a private transmission line across the Park, and that the Secretary of Agriculture would exceed his authority by granting the developer a revocable permit covering some 13,000 acres of National Forest land in addition to a term permit covering 80 acres.

The District Court granted the preliminary injunction. But on appeal the Ninth Circuit vacated the injunction, holding (1) that the Sierra Club lacked standing and (2) that the Sierra Club had shown neither a "reasonable certainty" that it would prevail nor irreparable injury. Judge Hamley, concurring in the result, would have held that the Sierra Club had standing.

---

[2]The written consents have been filed with the Clerk.

We discuss only two of the issues raised in this case: whether the Sierra Club has standing to challenge the administrative actions of federal officials in approving the Mineral King project, and whether the Secretary of the Interior acted within the scope of his statutory authority in approving a routing through Sequoia National Park of an access highway to the Mineral King resort. The facts insofar as they are relevant to the issues we discuss are stated more fully in our argument.

INTRODUCTION AND SUMMARY

The standing issue presented by this case—whether a national conservation organization may invoke the jurisdiction of the federal courts to challenge administrative action that affects our natural environment—comes at a time of increasing recognition both of the crucial role that organizations play in modern society and of the critical importance to the future of this planet of sound and enlightened techniques of environmental protection.[3] That these complementary trends may here be conjoined is hardly surprising. As the urgency of environmental protection and the magnitude of the task have become more apparent, both the need and the opportunity for citizen participation have expanded. Aside from involvement at the administrative level, the most effective means of citizen participation has been resort to the courts to enforce the laws relating to preservation of natural resources.

This has by all accounts been both effective and useful. The Chairman of the Council on Environmental Quality recently expressed the view, in a letter supporting the tax exempt status of groups that litigate to protect the environment, that:

---

[3]This Court noted in the opening sentence of its opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287, 4288 (March 2, 1971), the "growing public concern about the quality of our natural environment * * *."

> "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."[4]

That organizational litigants, and especially national groups like the Sierra Club and EDF, have played a central part in this favorable development simply reflects their capacity and willingness to identify, study, and, where necessary, challenge administrative action or inaction that may be harmful to the environment. As organizations with national orientation and substantial membership, they bring to bear the professional and financial resources necessary to participate effectively in what is frequently a technical and complex area.

If it were not for such groups, many critical environmental issues might never be recognized or, if recognized, might never be brought forcefully to the attention of the agencies or the courts. Judge Plummer observed in the recent case of *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971), that barring environmental groups from the federal courts "would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit." The costs of effective litigation are so great and the opportunity for an award of damages so unusual that "few members of the general public will have the resources or courage to face such odds for the sake of vindicating a right to which all are entitled as a matter of law."

---

[4] 1 BNA Env. Rep. 629 (No. 25, Oct. 16, 1970). The letter, written to the Commissioner of Internal Revenue, explained that litigating groups have strengthened anti-pollution enforcement, have encouraged elimination of regulatory gaps, and have represented the public's interest in enforcement of new governmental procedures. *Id.* at 701 (No. 28, Nov. 6, 1970).

Organizations are, by design and function, able to distill and effectively channel the views and interests of many individuals. They are increasingly looked to both by citizens who wish to express their views through resourceful and vigorous representatives and by all three branches of the government, which seek reliable expressions of citizen views. As Judge Leventhal recently remarked in a related context:

> "The underlying reality is that trade associations and other group representatives of interests are accepted, sometimes welcomed, by executive officials and agencies as a means of presenting and organizing in manageable form the inquiries and objections that the Government must consider. * * * Interest groups are, in today's complex society, an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect."[5]

In matters of environmental protection, where an unwise or unlawful action may affect the entire population but where frequently no one individual suffers special or perhaps even noticeable injury, organizations play an especially important role in assessing and publicizing the ultimate impact of the action and in formulating an appropriate response. Thus, Judge Merrill has stated persuasively in the context of environmental litigation:

> "Where, as here, the case presents issues of public moment—where what is at the heart of the problem is an alleged injury common to a substantial segment of the public—it may well be that the common cause can better and more earnestly be presented through

---

[5] *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971), slip opinion p. 7. The Second Circuit in its landmark *Scenic Hudson* decision noted the corollary that "[r]epresentation of common interests by an organization * * * serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process." *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

> an association of those affected than through a collection of individuals each tendering his own modest share of the common injury."[6]

The Congress has, in Section 101 of the National Environmental Policy Act of 1969,[7] recognized the special role of environmental groups by declaring that "it is the continuing policy of the Federal Government" to cooperate with "concerned * * * private organizations" in furthering the objectives of the Act. And the Council on Environmental Quality, in a recent statement of federal environmental policy, has made clear its "support for the elimination of procedural obstacles that bar citizens from litigating the merits of environmental controversies over Government action."[8] The Council accordingly "subscribes to the broadened concept of standing to sue expressed in judicial decisions such as that of the Second Circuit" in *Citizens Committee,*[9] a case we discuss later, and it has expressly endorsed the following resolution of its Legal Advisory Committee:

> "Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with federal environ-

---

[6] *Alameda Conservation Ass'n v. California,* 437 F.2d 1087, 1097 (9th Cir. 1971) (concurring opinion), *cert. denied,* 39 U.S.L.W. 3455 (April 19, 1971).

[7] Pub. L. 91-190, 83 Stat. 852, 42 U.S.C.A. § 4331 (Supp. 1971).

[8] Statement of Timothy Atkeson, General Counsel, Council on Environmental Quality, in *Hearings on S. 1032 Before the Subcommittee on the Environment of the Senate Commerce Committee,* 92d Cong., 1st Sess. (April 15, 1971), reprinted at 1 BNA Env. Rep. 1459 (No. 52, April 23, 1971).

[9] *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir.), *cert. denied,* 400 U.S. 949 (1970).

mental policy, as exemplified in the National Environmental Policy Act and in other legislation."[10]

If, despite this unequivocal statement, the government persists in its challenge to the Sierra Club's standing in this case, we think that its arguments, judged according to the criteria established by this Court, must fail. The Court in *Data Processing*[11] and *Barlow*[12] established a three-pronged test for standing: (1) whether the plaintiff has a stake in the outcome of the controversy, (2) whether its interests are within the zone of interests to be protected or regulated by the statute in question, and (3) whether judicial review has been precluded.

The "zone of interests" and reviewability prongs are, in the context of this case, relatively insignificant. It is perfectly evident that the relevant statutes create a zone of protected interests that embraces the interests asserted by the Sierra Club in the conservation and sound maintenance of public lands. And, in view of this Court's recent decisions concerning reviewability, we can foresee no reasonable argument that the actions of the federal officials here challenged are either immunized by statute from judicial review or committed by law to agency discretion.

The only live issue, in our view, concerns the Sierra Club's stake in the outcome. While this Court has not previously considered what allegations may be necessary to demonstrate a sufficient stake in the outcome for an organization like the Sierra Club, which alleges no private economic harm but which asserts instead the public interest in environmental protection, it has clearly identified the objective of the standing requirement—to ensure that the dispute is

---

[10]Statement of Timothy Atkeson, *supra* note 8.

[11]*Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

[12]*Barlow v. Collins*, 397 U.S. 159 (1970).

presented in an adversary context. In our view that objective would be fully served by the rules we propose, rules that have been applied successfully for years by the lower federal courts.

First, an organization's own interests, as demonstrated by its activities and conduct, may be injured sufficiently by government actions that disregard those interests to ensure a stake in the outcome. Second, regardless of whether an organization has suffered injury to its interests, it may serve as representative of the interests of those of its members who themselves are affected by the challenged action. Third, irrespective of injury to its interests or to its members, an organization may in appropriate circumstances serve as a responsible and representative spokesman for the interests either of a large class of persons who are affected or, where the effects of the action are sufficiently generalized, of the public at large. While these are meant to be alternative standards—that is, an organization may have standing if it meets any one of the three—we believe the Sierra Club in the context of this case satisfies each.

The court below, however, applied a far more restrictive standard—namely, that an organization may sue only upon allegations of tangible injury to its property, its status, or its members. This standard we view as contrary to both sound precedent and wise policy, and we urge this Court to reject it. It seems to us incontestable that an environmental organization *can* present in an adversary context a dispute concerning the use of natural resources, even where its own property is not to be injured. We believe the rules developed by the lower courts provide excellent guidelines—meriting this court's approval—for determining whether, in a specific case, the particular organizational complainant *in fact* has a stake in the outcome.

Apart from standing, we address only one other issue in this brief: whether the Secretary of the Interior acted within the scope of his statutory authority when he approved the use of a corridor through Sequoia National

Park for construction of the Mineral King Highway—a high-speed, high-volume access route to a proposed recreational development located beyond the park boundaries. The limits of the Secretary's authority are fixed by statutes requiring that the national parks be administered for the purposes of preserving them and providing for their enjoyment by the public. Approval of the road was unauthorized unless the Secretary reasonably considered that its construction was justifiable in terms of these purposes. In view of the known facts—that construction would have a damaging ecological impact, that Sequoia National Park is already an area of intensive public use, that handling automobile traffic is a growing problem in the national parks generally, and that the Director of the National Park Service himself seems to believe that building high-speed roads is not the way to make park experiences available to the public—it is doubtful whether the Secretary's action could be regarded as reasonable.

But our principal contention is not that the Secretary unreasonably concluded that the Mineral King Highway would serve a park purpose. Rather it is that, so far as the record discloses, he never *in fact* concluded that a park purpose would be served, or even was aware of the limitations on his statutory authority that prevent him from subordinating park interests to other interests—here the promotion of a commercial enterprise outside the park—that appear to him to be of paramount public importance. Not only is the record silent, and therefore inadequate, on these points, but the *post hoc* rationalizations of the Secretary's action that the record does contain indicate that he misconstrued his statutory authority to the extent he may have thought about it at all. Likewise, had the Secretary taken account of the considerations properly relevant to his decision to approve construction of the road—and here again the record fails to disclose what was taken into account and how its relevance was appraised—there is ample reason to believe that a park routing for the Mineral King Highway would have been rejected.

ARGUMENT

I

STANDING

In considering a matter as complex as standing,[13] one must have clearly in mind the sources of the doctrine and the policies that underlie it. In the case of standing, there are two distinct sources for the various rules.

First, standing as an aspect of justiciability is grounded in Article III of the Constitution, which limits the judicial power of federal courts to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968); see *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151-152 (1970). In this respect, an inquiry as to standing focuses on the party seeking to assert a claim rather than on the issues he seeks to raise, so that "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue * * *." *Flast*, 392 U.S. at 99-100. This requirement of a "proper party" is thought necessary to ensure that the dispute sought to be adjudicated "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101. In considering whether a particular complainant is in fact a proper party, courts look to the complaint for allegations supporting the party's "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Flast*, 392 U.S. at 101; *Barlow v. Collins*, 397 U.S. 159, 164 (1970). The principal issue to which we address ourselves in this section of our brief concerns the kind of allegations that are necessary to demonstrate such a stake in the outcome.

---

[13] "Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

In addition to the constitutional question, standing involves statutory limitations and policy considerations. Thus, the Congress can, within the confines of Article III, restrict or broaden access to the federal courts in terms of either parties or issues. See *Data Processing*, 397 U.S. at 154. In the absence of statutory command, the Court may apply a "rule of self-restraint" formulated for its own governance. *Id.; Barrows v. Jackson*, 346 U.S. 249, 255 (1953). An example of such a rule is that even one who has a stake in the outcome may not ordinarily challenge the constitutionality of state action by invoking the rights of others. *Id.*

The question presented by this case is whether an established national organization, founded and operated for the purpose of promoting the conservation and sound maintenance of the nation's natural resources, must be denied, for either constitutional or other reasons, standing to challenge allegedly unlawful administrative action affecting the public lands. We show in the following pages that, judged according to the standards that have been established by this Court and applied in the lower federal courts, such an organization may, and in the circumstances of this case does, have standing to sue.

A. Framing the Issue

We start by describing the analytic framework established by this Court for the consideration of standing questions, and then, in order to define the issue in terms of that framework, we recount the treatment given the Sierra Club's allegations by the courts below.

1. *The prevailing test.* This Court has in several recent decisions articulated a threefold test for standing to sue in the federal courts. The first question is the constitutional one—whether the plaintiff has "the personal stake and interest that impart the concrete adverseness required by Article III." *Barlow*, 397 U.S. at 164. This stake-in-the-outcome test is satisfied by an allegation that "the chal-

lenged action has caused [the complainant] * * * injury in fact, economic or otherwise," *Data Processing*, 397 U.S. at 152, although, as we show below, there are other ways to demonstrate a stake in the outcome.

The second and third tests are grounded in statutory law. They are "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Data Processing*, 397 U.S. at 153, and "whether judicial review * * * has been precluded," *id.* at 156. Both tests are, at least in the context of administrative action, evidently rooted in the provisions of the Administrative Procedure Act. Thus, the zone-of-interests standard derives from 5 U.S.C. § 702, which limits judicial review to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute * * *." And the reviewability test has its source in 5 U.S.C. § 701(a), which authorizes judicial review of administrative determinations "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

2. *The Sierra Club's allegations.* The Sierra Club in its complaint (A. 3-12),[14] which antedated the *Data Processing* and *Barlow* decisions, alleged: (a) that it is a non-profit corporation organized and operating under the laws of the State of California with a national membership of 78,000 and a San Francisco Bay area membership of 27,000; (b) that "for many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested"; (c) that among its "principal purposes" is the protection

---

[14] Throughout this brief our references to the Appendix are indicated by "A". Materials that are part of the record but are not printed in the Appendix are indicated by "R".

and conservation of the resources of the Sierra Nevada Mountains; (d) that it would be aggrieved, and its "interests would be vitally affected," by the acts of the defendants; and (e) that the defendants would, by their past and threatened acts relating to the proposed Mineral King project, exceed their statutory authority.

3. *The courts below.* a. The District Court's decision upholding the Sierra Club's standing and granting preliminary relief was rendered in an unreported opinion which, as to the standing issue, stated simply: "Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint * * *, may be held to be sufficiently aggrieved to have standing as a plaintiff herein" (A. 197).

b. Although the briefs to the Court of Appeals were addressed in large part to the old "legal interest" test of standing,[15] a test that was thereafter expressly abandoned in *Data Processing*, 397 U.S. at 153 & n.1, and although the opinion of the Court of Appeals bore traces of "legal interest" terminology,[16] the court nevertheless endeavored to

[15] See, *e.g.*, Brief for Appellees, pp. 8-15. The "legal interest" test differs from the "zone of interests" test in that the former required not merely that the complainant's interests be arguably protected but that he in fact had "a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939).

[16] Thus, the court implied that the Sierra Club would be permitted to sue if it alleged damage to "an interest * * * entitled to legal protection * * *" (433 F.2d at 28), or if it could point to "an element of legal wrong being inflicted upon" it (*id.* at 32). The cases quoted and evidently relied upon were likewise cast from the discarded legal interest standard. The court quoted extensively the "legally protected interest" and "legal wrong" language from *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969) (opinion of Mr. Justice Marshall); *National Ass'n of Securities Dealers, Inc. v. SEC*, 420 F.2d 83, 104 n.5 (D.C. Cir. 1969) (Burger, J., concurring), *vacated*, 39 U.S.L.W. 4406 (U.S., April 5, 1971); *Associated Industries, Inc. v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

apply to the Sierra Club the three-pronged test of *Data Processing*—stake-in-the-outcome, zone-of-interests, and reviewability. With respect to stake-in-the-outcome, in the court's view the only harm alleged by the Sierra Club was that "the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members." 433 F.2d at 30. This the court considered insufficient:

> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id.*

In order to satisfy the court's requirement of "direct interest," the Sierra Club would have been required to allege that "its property will be damaged, that its organization or members will be endangered or that its status will be threatened." *Id.*

With respect to the zone-of-interests standard, the Ninth Circuit, while viewing this Court's language as "not entirely clear," considered that "it does not establish a test separate and apart from or in addition to the [stake-in-the-outcome] test." *Id.* at 31. Accordingly, it did not address itself separately to the zone-of-interests inquiry. It was similarly silent with respect to reviewability.

We demonstrate in the following sections that the Court of Appeals' application of the stake-in-the-outcome test was both contrary to sound precedent and grounded in unwise policy considerations, that the Sierra Club's interests are clearly within the zone of interests to be protected by the statutes in question, and that the administrative actions challenged by the Sierra Club are plainly reviewable.[17]

---

[17]We recognize that some commentators have suggested that the *Data Processing* standards be reconsidered or modified so as further to expand access to the courts. *E.g.*, K. C. Davis, *Administrative Law*

B. Stake in the Outcome

Whether the Sierra Club has alleged a stake in the outcome of this case sufficient to survive the constitutional challenge to its standing depends upon the circumstances in which organizations and associations may sue in the federal courts. Although this Court has not had the occasion to consider what allegations might be required to demonstrate the stake of groups like the Sierrra Club (or the Environmental Defense Fund), which seek to litigate issues of importance to the general public, it has laid a solid foundation for such consideration, upon which the lower courts have erected an equally solid structure.

Flast made clear that the function of the stake-in-the-outcome standard is to limit the activity of federal courts to the resolution of disputes between parties with adverse interests. This, then, is the goal that must be served in applying the stake-in-the-outcome test to "public-interest" organizations. The position of the court below—that such an organization can have no stake unless it alleges some form of traditional private harm, such as property damage—seems to us unnecessarily restrictive precisely because it excludes from the courts those whose presence may well be the best assurance of adverseness. To be sure, not all groups in all circumstances are proper parties to request an adjudication of a particular issue. But in order to sort the proper from the improper, one must first recognize that *some* organizations *can* have a sufficient stake in the outcome even without alleging some private economic harm.

In our view there are three additional circumstances in which an association can demonstrate a sufficient stake for

---

Treatise—1970 Supplement, §§ 22.00-22.00-5, at 702-27 (1971); Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971). And see the dissenting opinion of Mr. Justice Harlan in *Investment Company Institute v. Camp*, 39 U.S.L.W. 4406, 4413 (U.S., April 5, 1971). We adhere to the *Data Processing* framework, however, because we do not consider it necessary to depart from its standards in order to sustain the petitioner's standing in this case.

standing purposes. First, the organization's own established interests may be injured in fact by the challenged actions. Second, the organization may be the authorized representative of the interest of its members, who are themselves among the class of persons injured or affected by the challenged actions. Third, the organization may serve as a responsible and representative spokesman for the interests either of the affected public or, if the injury is more generalized, of the public at large. The courts that have considered the standing of "public-interest" organizations have, with near unanimity, applied one or more of these standards. That this approach has neither opened the door to hundreds of obstructive litigants nor fostered collusive or hypothetical lawsuits speaks persuasively to its soundness.

We set forth below the detail of each alternative and explain why in our view the Sierra Club in the circumstances of this case satisfies the requirements of each. We conclude by commenting briefly upon the policy considerations occasionally cited in support of a restrictive rule that would bar "public-interest" groups from the federal courts.

1. *Injury to the organization's established interests.* The traditional means of demonstrating a sufficient stake in the outcome has been for the complainant to allege that he has suffered "injury in fact." *E.g., Investment Company Institute v. Camp,* 39 U.S.L.W. at 4406-07; *Data Processing,* 397 U.S. at 152; *Flast,* 392 U.S. at 106; *Baker v. Carr,* 369 U.S. at 208; *Barrows v. Jackson,* 346 U.S. at 256. Courts have, of course, always taken cognizance of direct injury to the financial or proprietary interests of organizations, and have seldom had difficulty finding a sufficient stake in the outcome even where the injury was indirect or the interest non-economic.[18] This was recognized explicitly in *Data*

---

[18] *NAACP v. Button,* 371 U.S. 415, 428 (1963) (organization had standing to challenge a statute that would have curtailed its activities in sponsoring and encouraging litigation in civil rights cases); *Pierce v. Society of Sisters,* 268 U.S. 510, 531 (1925) (private school had standing to challenge a state statute requiring all parents to send

Processing, which left no doubt that the injury sufficient for purposes of standing may affect "'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154.[19]

This Court has not to our knowledge expressly considered the problem presented here—whether an organization alleging that its established non-economic interests are adversely affected by agency action (and not that it will suffer financial damage or that its activities will be directly curtailed) is sufficiently injured to satisfy the stake-in-the-outcome test. But we cannot, by reference to the defined objectives of the standing requirement, see any justification for the rule adopted by the Ninth Circuit that such injury is necessarily insufficient. To the contrary, all indications are that if the harm ensures a truly adverse proceeding it is enough, even if it affects non-economic values. That those values are held by an association rather than by an individual should,

---

their children to public schools, since "enforcement of the statute would seriously impair, perhaps destroy, the profitable features of [the school's] * * * business and greatly diminish the value of their property"); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958) (petitioner had standing to contest a state court order requiring production of its membership lists, partly because the association itself, if compelled to produce the lists, might well suffer indirect financial injury "through diminished financial support and membership").

The court has, of course, frequently conferred standing upon *individuals* whose injury was non-economic. Thus, for example, parents of children attending public schools had standing in *Zorach v. Clauson,* 343 U.S. 306 (1952), to challenge the constitutionality of New York's "released time" program. The alleged impairment of plaintiffs' votes by malapportionment of a state legislature was injury enough in *Baker v. Carr,* 369 U.S. at 207-08. And in *Henderson v. United States,* 339 U.S. 817, 823 (1950), a passenger was entitled to contest the legality of Interstate Commerce Commission rules permitting racial segregation in railroad dining cars.

[19]The opinion also states as a general proposition that "standing may stem from [non-economic harm] * * * as well as from the economic injury on which petitioner relies here." 397 U.S. at 154.

we believe, make no difference. A court must, of course, be satisfied in the case of an association that its values are deeply held and not manufactured for the purposes of litigation, but that can be accomplished by requiring the organization to show, by reference to its activities and conduct, that its interests are established and demonstrated.

A number of lower courts have taken precisely that approach, including perhaps most prominently the Second Circuit in its *Scenic Hudson*[20] decision, which has served as the cutting edge of the developments in this area and which was cited with evident approval by this Court in *Data Processing*, 397 U.S. at 154. A brief survey of these cases will illustrate the factors that have been viewed as significant in determining whether a group's interests are sufficiently demonstrated.

In the groundbreaking *Scenic Hudson* case an association of "conservationist organizations" and three affected towns sought review of an FPC order granting approval of a pumped storage hydroelectric project on the Hudson River. The FPC contended that these organizations had no standing to obtain review because they made "no claim of any personal economic injury resulting from the Commission's action." 354 F.2d at 615. The Second Circuit, after noting that the project was to be located "in an area of unique beauty and major historical significance" and that the Federal Power Act requires the FPC to take account of "the aesthetic, conservational, and recreational aspects of power development," held that "those who by their activities and conduct have exhibited a special interest in [aesthetic, conservational, and recreational values] * * *, must be held to be included in the class of 'aggrieved' parties" under the Federal Power Act. *Id.* at 613, 616.

Though the court remarked that one of Scenic Hudson's constituent organizations would have suffered a traditional

---

[20] *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

economic loss as well (inundation of its trailways), the thrust of the opinion was not thereby weakened. Indeed, its strength became almost immediately apparent. The Second Circuit's view—that a demonstrated interest in conservation may be sufficiently injured for standing purposes by agency action that infringes that interest—was extended beyond the confines of the Power Act in *Road Review League v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967). The court held that a town, a local civic association of residents, and a "non-profit association which concerns itself with community problems, primarily those involving the location of highways" [270 F.Supp. at 652] were "'aggrieved' by agency action which allegedly has disregarded their interests" [*id.* at 661]—namely, the Federal Highway Administrator's approval under the Federal Highways Act of a route alignment for an interstate highway.

The District Court recognized that its holding amplified *Scenic Hudson* in two important respects: (1) The Federal Highways Act, unlike the Power Act, had no special "persons aggrieved" provision. As to this, the court could "see no reason why the word 'aggrieved' should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act." *Id.* (2) The plaintiffs in *Road Review League* had brought an independent court action, whereas the petitioners in *Scenic Hudson* had sought review of an administrative decision in a proceeding to which they had been parties. As to this distinction, the court observed that the plaintiffs had actively participated over the course of four years in informal attempts to secure an administrative determination favorable to their interest. The court thus stated that if its decision was an extension of *Scenic Hudson* "it is an extension which I believe to be warranted by the rationale of that decision." *Id.*

The Second Circuit itself, in its most recent treatment of the issue, expressly approved the *Road Review League* reading of *Scenic Hudson*. *Citizens Committee for Hudson*

Valley v. Volpe, 425 F.2d 97, 104 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). In *Citizens Committee*, the U.S. Army Corps of Engineers had issued a permit authorizing New York State's Department of Transportation to effect the dredging and filling of a portion of a six-lane highway. Suit was brought by the Sierra Club, the Citizens Committee (an unincorporated association of citizens who resided near the proposed highway), and the Village of Tarrytown (through which the highway would pass) to enjoin the issuance of any permits or the commencement of any construction in the absence of congressional consent and approval of the Secretary of Transportation as required by the Rivers and Harbors Act and the Department of Transportation Act. The District Court granted the relief sought, and the defendants on appeal raised the issue of standing.

Dealing first with the Sierra Club and the Citizens Committee, the Court of Appeals observed that they

> "made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were 'aggrieved' when the Corps acted adversely to the public interest." 425 F.2d at 102.

Both the Citizens Committee and the Sierra Club, which had "a history of involvement in the preservation of national scenic and recreational resources," had established the strength of their interest in conservation and the genuineness of their concern with local natural resources by vigorously presenting their views to state and federal officials. On these facts the court considered that the organizations would be injured by the challenged actions, which allegedly infringed their interests.

> "These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns are 'aggrieved' * * *." *Id.* at 104.

This view is by no means limited to the Second Circuit. In *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 2 BNA Env. Rep. Cas. 1422 (4th Cir. 1971), the plaintiff, "a non-profit membership corporation dedicated to preserving natural, scenic and historic areas in the West Virginia Highlands," sought an injunction against mining and timber-cutting in part of the Monongahela National Forest. The Fourth Circuit, affirming the District Court's grant of a preliminary injunction, took note of the Conservancy's modest size (200 members) but intensive activity and vital interest in the Forest and in the particular area at issue (as reflected in its newsletters, field trips, hikes, meetings, and scientific studies). It held with respect to standing that the Conservancy's aesthetic, conservational, and recreational interests would be injured by the mining and timber-cutting activities.

In the recent case of *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970), the District Court was faced with a nearly identical issue. The plaintiff, an environmental organization with "a long history of activity in conservation matters and natural resource preservation," sought to enjoin federal approval of drilling and exploring operations for minerals in a portion of the National Wilderness Preservation System in Minnesota. In rejecting the defendants' contention that the Izaak Walton League lacked standing, the court reasoned that, since the League had "been active for many years in urging congressional and other legislative action" and had been directly and deeply involved in securing congressional establishment of the wilderness lands in question, there could be no doubt "that plaintiff actively will pursue in an adversary way the prosecution of this suit * * *." 313 F. Supp. at 1316. Moreover, since the League "is not a 'johnny-come-lately' or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep," it is injured in fact by action that disregards its aesthetic, conservational, and recreational interests, *id.* at 1317, notwithstanding that it owns no land and asserts no

claim of mineral rights in the wilderness area, and that it has no economic interest in the outcome of the suit, *id.* at 1316.

Other courts, with the exception of the Ninth Circuit, are in accord with this approach. See, *e.g.*, *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260, 1280-84 (E.D. Ark. 1971); *Crowther v. Seaborg*, 312 F.Supp. 1205, 1216 (D. Colo. 1970); *Parker v. United States*, 307 F.Supp. 685, 687 (D. Colo. 1969); *Delaware v. Pennsylvania N.Y. Central Transp. Co.*, 2 BNA Env. Rep. Cas. 1355, 1358-60 (D. Del. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1173, 1174 (D.D.C. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F.Supp. 238, 245 (M.D.Pa. 1970). Indeed, until this case was decided by the Ninth Circuit and followed in *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), *cert. denied*, 39 U.S.L.W. 3455 (April 19, 1971), that Circuit's decision in *State of Washington Dep't of Game v. FPC*, 207 F.2d 391 (1953), *cert. denied*, 347 U.S. 936 (1954), was a leading case holding that environmental organizations may be aggrieved by action that disregards their interests.[21]

The *Washington Game* case and the more recent *Scenic Hudson* line of decisions represent a sound approach to organizational standing. They recognize that organizations can have a vital stake in the outcome of a controversy involving their interests and they focus upon whether those interests are sufficiently established and demonstrated to ensure that the dispute "will be presented in an adversary context." *Flast*, 392 U.S. at 101. The considerations that enter into that judgment may include the age of the organization, its resources, the consistency of its expressed

---

[21] The Washington State Sportsmen's Council, together with two state agencies, were each held to be aggrieved by an FPC approval of dam construction on the Cowlitz River, because the project would "destroy fish which they, among others, are interested in protecting." 207 F.2d at 395. The case was relied upon by the Second Circuit in *Scenic Hudson*, 354 F.2d at 616.

interests, its participation in the formal or informal administrative proceedings that led to the dispute, its activity in or near the lands involved, its vigorous participation in other controversies of a similar nature, and any other conduct that reflects the group's commitment to its asserted interests. These factors are, of course, appropriately assessed by the District Court at the time the issue is raised or by the reviewing court upon the facts of record. If that assessment persuades the court that "the question will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" [*id.* at 106], the plaintiff should not be refused access to the courts because of an artificial and restrictive requirement that there be some more "direct" or "personal" injury.

The Ninth Circuit applied precisely such a restrictive test and concluded that the Sierra Club—one of the nation's oldest and largest conservation groups, one of whose traditional concerns has been with the lands of the Sierra Nevada Mountains—"does not allege that it is 'aggrieved' or that it is 'adversely affected' within the rules of standing." 433 F. 2d at 32. What is meant by this is not entirely clear from the opinion. On the one hand, the court stated that the Sierra Club would have standing only if its property were damaged or its status threatened. *Id.* at 30. On the other hand, it suggested, by way of distinguishing the Second Circuit's decision in *Citizens Committee*, that the case would have been a different one had the plaintiff been a "local conservationist organization made up of local residents and users of the area affected * * *." *Id.* at 33. We doubt, however, that the latter suggestion represents the court's holding,[22] and our doubt has been confirmed by the Ninth

[22]We base this view on two considerations. First, if the opinion meant to imply that the Sierra Club is not precisely such a "local" organization, it would be founded on a factual misconception. With respect to the Sierra Nevadas, we are aware of no more appropriate "local" group made up of persons who use and enjoy the area than the Sierra Club. Second, if it meant to invoke a principle of formality

Circuit itself in an opinion written by the same judge some four months after the decision in *Sierra Club*.

In *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (1971), *cert. denied*, 39 U.S.L.W. 3455 (April 19, 1971), the plaintiff was, so far as one can tell from the opinions, precisely the kind of local group referred to in *Sierra Club*. It was made up of users of the San Francisco Bay and residents of the area, who alleged that the challenged actions would destroy fisheries and wildlife from which they personally benefited, and would seriously harm the Bay's flushing characteristics causing deleterious climatic effects. The organization alleged that its purpose was to protect the public interest in the waters of San Francisco Bay. The court, though it allowed certain individual plaintiffs to sue, held that the organization lacked standing because "it is not hurt in any practical way which entitles it to call upon the courts for redress or protection." 437 F.2d at 1090. As in *Sierra Club*, the group had not asserted that "any of its rights or properties are being infringed." *Id.* at 1089. The rationale of the court's view, as stated concisely in two paragraphs, is that organizations *qua* organizations are not proper parties to raise "public interest" issues because that would be destructive of good government:

> "Standing is not established by suit initiated by this association simply because it has as one of its purposes the protection of the 'public interest' in the waters of the San Francisco Bay. However well intentioned the members may be, they may not by uniting create for themselves a super-administrative agency or a *parens patriae* official status with the capability of over-seeing and of challenging the

---

that would exclude the Sierra Club not for lack of injury but for neglect formally to plead the details of its members' outdoor activities, the obviously appropriate course would have been a form of remand that would have permitted correction of the technical omission by amendment to the complaint. Certainly there could be no purpose in preparing a lengthy opinion on the silent assumption that the error could not be remedied.

> action of the appointed and elected officials of the state government. Although recent decisions have considerably broadened the concept of standing, we do not find that they go this far.
>
> "Were it otherwise the various clubs, political, economic, and social now or yet to be organized, could wreak havoc with the administration of government, both federal and state. There are other forums where their voices and their views may be effectively presented, but to have standing to submit a 'case or controversy' to a federal court, something more must be shown." *Id.* at 1090.

We will have more to say later about this view. It is enough for now to note that the Court of Appeals' holding in *Sierra Club* evidently rests on an antagonism to organizational litigants, not on a factual judgment that the Sierra Club was not a "local" organization.

We have already shown that the court's restrictive view of injury cannot be squared with its own 1953 ruling in *Washington Game* or with recent authority from other circuits. It should also be clear that, had the Sierra Club's allegations been measured against the standards established by that recent authority, sufficient injury would have been shown. The Club asserted that it has an established and enduring interest in conservation of public lands generally and a special interest in the Sierra Nevada Mountains (two propositions that are beyond factual dispute) and that its interests would be vitally affected by the actions challenged. Under *Scenic Hudson* and its progeny, this would have been enough to satisfy the standard of injury in fact.

2. *The organization as representative of its members' interests.* Having shown that an environmental organization can demonstrate its stake in the outcome of a controversy by showing that its established interests have been contravened, we turn next to an alternative means to the same end. Regardless of whether an organization has suffered injury to its established interests, it may serve as the authorized representative of the interests of its members, all or some

of whom may themselves be aggrieved by the challenged action. This principle is settled; it has been applied by this Court in the context of trade association and by other courts in a variety of circumstances including environmental litigation.

In *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963), the appellants were "associations of motor carriers, authorized under 49 U.S.C. § 5b, [who] * * * perform significant functions in the administration of the Interstate Commerce Act * * *." 372 U.S. at 247. The District Court had dismissed their action to set aside an ICC order both on standing grounds and on the merits, and the Supreme Court affirmed by *per curiam* order. In denying a subsequent petition for rehearing, the Court made clear that its affirmance was based solely on the merits issue:

> "We disagreed that appellants lacked standing to challenge the Commission's order in the District Court.* * * Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are *proper representatives of the interests of their members*, appellants have standing * * *." *Id.* (emphasis added).[23]

The principle that an organization whose members are aggrieved by administrative action has standing as their representative to challenge that action is not limited to associations "authorized" under the Interstate Commerce Act.

---

[23]See also *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953), which conferred standing on an "association of non-profit rural electric cooperatives" whose members had "a substantial interest in the development of low-cost power" at a particular site, and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958), which permitted an association to represent its members' interests in resisting an order requiring disclosure of membership lists. The Court in *NAACP* stated:

> "Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association * * * is but the medium through which its individual members seek to make more effective the expression of their own views."

The District of Columbia Circuit, in a series of decisions, has conferred standing upon a labor organization representing the interests of government employees in a work-related dispute,[24] a national trade association for the coin-operated laundry industry representing the interests of its members concerning a Labor Department ruling on the applicability of the Fair Labor Standards Act,[25] and citizens associations representing the interests of their members in challenging the issuance of liquor licenses to neighborhood restaurants.[26]

These decisions establish a sound approach to the standing of organizations asserting their members' interests. If all or some of the members[27] are aggrieved by the allegedly unlawful actions, then an association organized to promote the interests of its members and serving as an authorized spokesman for those interests has a sufficient stake in the outcome of a controversy involving the members' interests. The only questions before a district court would thus be (1) whether some of the members are aggrieved, (2) whether

---

[24] *Lodge 1858, American Federation of Government Employees v. Paine*, 26 Pike & Fischer Ad. L.2d 750, 765-67 (D.C. Cir. 1970) (opinion of Robinson, J.); *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 469-71 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1962). In both cases, the court noted that the organization was recognized as the exclusive representative of the employees, that it was charged by Executive Order with representing the interests of all employees without discrimination, that it had the responsibility for consulting with the employer on matters such as those in issue, and that the members of the group were themselves affected by the challenged determination.

[25] *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971), slip opinion at 5-8.

[26] *Citizens Association of Georgetown v. Simonson*, 403 F.2d 175, 176, (D.C. Cir. 1968); *MacArthur Liquors, Inc. v. Palisades Citizens Association*, 265 F.2d 372, 374 (D.C. Cir. 1959).

[27] The association's "standing does not depend on any unanimity of interest * * * on the part of all its members." *Watson, supra* note 24, at 470 n. 30.

the organization was formed to represent the pertinent interests of its members, and (3) whether it is the authorized spokesman for its members' interests. Where all three questions may be answered affirmatively, the organization should not be denied standing on the ground that it lacks a stake in the outcome, for it would be "artificial and pointless to cut off its representative functions at the courthouse door." *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969). In this latter repsect, there would ordinarily be no need for an affirmative showing by the organization that it is authorized to represent its members' interests. "[A]bsent evidence to the contrary, it is reasonable to assume that the representative speaks effectively for his constituency." *Id.* Of course, if doubt is raised either by the opposing party or otherwise the court may require an appropriate showing of authorization or may order that the members be notified of the action and be given an opportunity to disassociate themselves from it.[28]

The Ninth Circuit in its opinion below did not address itself directly to the Sierra Club's capacity to represent the interests of its members. The court seemed to suggest, however, by referring to the Club's failure to allege that its members would be injured, 433 F.2d at 30, 33, and by distinguishing other decisions on the ground that they involved local groups made up of persons affected by the administrative action, *id.* at 33, that such representative standing might be appropriate in certain circumstances. If that is the holding of the decision below—that is, if the Sierra Club was denied standing because its members were not aggrieved rather than because it simply could not represent its members' interests—then we believe that the court misapplied a

---

[28]Cf. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260, 1283 (E.D. Ark. 1971), where the court required the plaintiff environmental organizations "to notify their members of the pendency of this action and of the legal positions being taken * * *."

sound principle to the facts before it. If, on the other hand, the decision below reflects a disinclination to permit associations to speak as litigants for the interests of their members, then we believe the court embraced a principle that impedes instead of furthering the prime objective of the stake-in-the-outcome requirement, namely, ensuring an adverse presentation. If the interests of aggrieved persons are in fact properly represented, the representative may be expected to present the dispute in the same adversary context as would the individuals themselves.

Here as in the case of injury to an organization's interests, the Ninth Circuit's subsequent opinion in *Alameda Conservation* illuminates the holding of the court below. By citing this later decision we do not mean to suggest that it is before this Court for review. Rather, we consider that an opinion written so soon after the one in this case by the same judge and on so similar a point provides some help in understanding the earlier one. If we are right in that assumption, it seems clear from *Alameda Conservation* that the result would have been no different in this case if the Sierra Club had alleged injury to its members. The court in *Alameda Conservation* denied standing to a local organization seeking to assert its members' interests in preserving San Francisco Bay, where those members' "health and the enjoyment of their property [were] materially affected by the filling of the bay." 437 F.2d at 1089. The reasoning reveals a rather well defined resistance to allowing groups to assert the interests of their members:

> "The suggestion is that the corporation may assert its members rights because it is in the best position to do so. Moreover, the Association's 'nexus' with its members gives it standing to appear as their representative in federal courts, it is asserted.
>
> "* * * The primary purpose in forming a corporation in most instances is not to give the corporation an interest in the member's real property or other assets. Just the opposite. It is to be sure that the member's property interests will not be jeopardized

> by his associations with others. It is not to create a nexus but to disconnect the member from the organization as to property, assets or liability. Nor does the fact that the corporate purposes are akin to those of its members make the corporation the authorized spokesman for the purpose of asserting its members constitutional rights. * * *If the association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing. The point is that the standing necessary to assert as a litigant must be that of the litigant." *Id.* at 1090-91.

This view is, in our judgment, wholly inconsistent with the reasoning underlying the decisions of this Court and other courts that have conferred standing upon organizations as representatives of their members, and we believe it should be rejected. If the proper standards were applied, the Sierra Club surely would qualify as spokesman for the interests of its members. Indeed, it has been granted standing in precisely that role by the District Court in Alaska. *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1389-93 (1971). That was an action to enjoin the sale of timber located in the Tongass National Forest brought by the Sierra Club, the Sitka Conservation Society (an Alaska nonprofit conservation organization), and an individual who conducted expeditions into portions of the forest lands affected. The Sierra Club had 300 to 400 members in Alaska, 80 of whom lived in the area adjacent to the timber sale area and enjoyed its scenic and recreational aspects. Sitka had only 20 to 40 members, all of whom resided in Sitka more than 28 miles from the sale area but some of whom on occasion used the sale area for their personal enjoyment. The District Court, having granted the defendant's motion to designate the suit a class action, considered with care the question of standing. It held (1) that "the

aesthetic, recreational, and conservational interests of local members of both organizations who utilize and enjoy the sale area are directly affected by the Secretary's decision," (2) that although the members had not formally authorized the organizations to prosecute the actions in their behalf, none had asked to be excluded from the class, and (3) that both organizations therefore "have standing to assert the * * * interests of local members and users who are directly affected * * *." *Id.* at 1392.[29]

There is nothing in the present record to raise any doubt that the Sierra Club was formed to assert the aesthetic and conservational interests of its members, or that it is the authorized representative of those interests. And while the complaint was silent as to the activities of the Club's members (evidently because it considered its own interests injured sufficiently for standing under the *Scenic Hudson* authorities), it did make reference to the sizable membership in the San Francisco Bay area and it has on brief to this Court represented the obvious facts concerning the outdoor activities of those members.[30] Moreover, the affidavit of the Club's staff director (A. 25-40) and the attached exhibits (A. 41-158), all of which were before the District Court, evidence the membership's concern for the future of the Mineral King Valley. In these circumstances we do not see that any purpose would be served at this stage by putting the petitioner to the formality of returning to the District Court for an opportunity to make a technical amendment to the pleadings. Even if this were the only ground upon which to base a conclusion that the Sierra Club has the necessary stake in the outcome, and we do not believe it is,

---

[29] Although the case was decided after the Ninth Circuit's decision in *Alameda Conservation*, the District Court felt free to reach its conclusion because, by designating the suit a class action, it had foreclosed the possibility of inconsistent verdicts, a possibility that had concerned the concurring judge in *Alameda Conservation*. 2 BNA Env. Rep. Cas. at 1392.

[30] Petition for Certiorari, p. 14.

the Court could appropriately treat the facts as if they had been more fully alleged in the complaint. Thereafter, when the case returns to the District Court either for trial on the merits or for entry of final judgment, the petitioner could seek permission under Rule 15(a) of the Federal Rules of Civil Procedure to make the conforming amendment.

3. *The organization as spokesman for the public interest.* We come now to yet a third way for an organizational litigant to demonstrate its stake in the outcome of a controversy: it may, in appropriate circumstances, serve as a responsible and representative spokesman for the interests of the concerned or affected public or, if the harm is sufficiently generalized, of the public at large. This stems from the recognition that in some situations the injury that flows from a challenged action, while perhaps directly aggrieving a few individuals, truly affects a broad class of persons no one of whom may have sufficient concrete injury to sue on his own behalf. In those circumstances, the interests of that broad class may appropriately be represented by an association whose demonstrated commitment to the principles asserted ensure that it will present a concrete dispute in an adversary context. This is not, of course, to suggest that there can be only one representative of the public interest, or even that there can be only one public interest, in a particular set of circumstances. With respect to the Mineral King project, for example, there may be several publics with conflicting interests—such as the conservation public and the skiing public—and each may have several responsible spokesmen. So long as the interests are clearly defined and shared by members of a relatively broad class of the public, each should be entitled to representation by responsible groups organized to assert those interests.

The starting point for this discussion is the opinion in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). That case involved a challenge, on grounds of racially and religiously discriminatory broadcasting policy and excessive commercials, to

the FCC's renewal of an operating license for television station WLBT in Jackson, Mississippi. The petitioners before the FCC were the Office of Communication of the United Church of Christ (an instrumentality of the Church, which is a national denomination with substantial membership in WLBT's prime service area), two individual residents of Mississippi (both of whom were civil rights leaders who owned television sets and one of whom resided in WLBT's prime service area), and the United Church of Christ at Tougaloo (a congregation of the United Church of Christ within WLBT's area). All had sought to intervene before the Commission in their own behalf and as representatives of all other television viewers in Mississippi. The FCC denied the petition to intervene on standing grounds, stating that the petitioners were unable to show an invasion of a legally protected interest or an injury that was direct and substantial, and that their injury was therefore no greater than that of the general public.

Rejecting the FCC's view that standing requires an assertion of economic injury or electrical interference, the District of Columbia Circuit held that members of the listening audience have standing to participate in a license renewal proceeding:[31]

---

[31] The precise issue before the court was whether the petitioners had standing before the FCC. But the principles discussed in the opinion are broadly applicable to standing generally and were so understood by the court. It observed (359 F.2d at 1000 n.8) that since all parties considered the same standards applicable for standing before the FCC and standing in the federal courts, "we have * * * used the cases dealing with standing in the two tribunals interchangeably." Moreover, the court expressly rejected the Commission's independent argument that the petitioners lacked standing to seek review of the Commission's order. *Id.* at 1007 n.25. A number of cases that have relied on *Church of Christ* have noted that the opinion's significance is not limited to FCC standing. *E.g., Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 103 n.4 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 732-33 (D.C. Cir. 1970).

> "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist." 359 F.2d at 1002.

This participation may be, indeed may *preferably* be, through "responsible spokesmen for representative groups having significant roots in the listening community." *Id.* at 1005. Such "intervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest * * *." *Id.* at 1006.

The court specified two questions that must be answered before a "public interest" group may be granted standing: (1) whether the challenged actions are allegedly inconsistent with the public interest, and (2) whether the complainant has alleged sufficient facts to show that it is a responsible and representative spokesman for that public interest. *Id.* at 1005. Although the court in *Church of Christ* was reluctant to categorize the sort of groups that appropriately could serve as such spokesmen, it did suggest some pertinent guidelines.

> "The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." *Id.*

These groups must have a legitimate interest in the proceedings in which they seek to be involved, and they must be

free of a desire only to delay administrative action "for some private selfish reason." *Id.* at 1001.

Church of Christ's "public" was a reasonably circumscribed class of affected persons—the listening audience in WLBT's area. But, as reflected in the decisions that have followed *Church of Christ's* lead, the court's reasoning has obvious application to the full range of "publics," from a small and identifiable group of affected persons to the public at large. In *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), for example, "five organizations engaged in activities relating to the environment" [428 F.2d at 1095], including EDF and the Sierra Club, sought to compel the Secretary of Agriculture to issue notices of cancellation for all "economic poison" containing DDT and to suspend registration for such products pending cancellation proceedings. Denying the Secretary's motion to dismiss, the Court of Appeals held that the petitioners had standing, that the Secretary's refusal to act was a final order, and that the order was reviewable.

With respect to standing the court noted that the injury complained of was of universal nature.

> "The injury alleged by petitioners is the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment." 428 F.2d at 1096.

The organizations, each of whom had "a demonstrated interest in protecting the environment from pesticide pollution" [*id.* at 1097], were viewed as appropriate spokesmen for the interests of the affected public, *i.e.*, mankind.

> "Like other consumers, those who 'consume'—however unwillingly—the pesticide residues permitted by the Secretary to accumulate in the environment are persons 'aggrieved by agency action within the meaning of a relevant statute.' Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem." *Id.*

The Second Circuit took a similar view in *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, *cert. denied*, 400 U.S. 949 (1970), a case we noted above in connection with injury to an organization's established interests. The court, evidently in an alternative approach to the question of standing, held that the plaintiffs, who included the Sierra Club and a local conservation group, could appropriately speak for the interests of the public in preservation of natural resources:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." 425 F.2d at 105.

Numerous other courts have adopted the *Church of Christ* approach. See, *e.g.*, *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970) (national and state welfare recipients organizations have standing to represent interests of "class of welfare recipients"); *Environmental Defense Fund, Inc. v. United States Dep't of Health, Education & Welfare*, 428 F.2d 1083, 1085 n.2 (D.C. Cir. 1970) (EDF accorded standing as representative of general public's interest in preservation or restoration of environmental quality); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260 (E.D. Ark. 1971) (EDF and other environmental groups may represent public interest in Cossatot river and its environs); *Crowther v. Seaborg*, 312 F.Supp. 1205, 1213, 1215-16 (D. Colo. 1970) (organization may represent interests of "all those persons entitled to the protection of their health and all those persons entitled to the full benefit, use and enjoyment of the natural resources of the State of Colorado"); *Delaware v. Pennsylvania N.Y. Central Transp. Co.*, 2 BNA Env. Rep. Cas. 1355, 1359 (D.Del. 1971) (dictum that plaintiffs including civic organization may represent "important public

interests of navigation, environment, ecology, and conservation"); *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809, 826-27 (E.D.Pa. 1968) (association of residents have standing to represent interests of displaced homeowners and of the general public in decent housing for American families); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F.Supp. 238, 245 (M.D. Pa. 1970) (environmental organization may represent the interests of "present and future generations" in conservation of resources).

The principles of *Church of Christ* have thus been applied in a variety of circumstances, including those in which the challenged action had a direct impact upon certain individuals, who presumably could have sued on their own behalf, but also had a generalized effect upon some broader class of the public. See, *e.g.*, *Powelton Civic Home Owners Ass'n v. HUD*, *supra*. Whether the interests of that broader class are enough to sustain the standing of a representative group is a matter best decided by the district court in light of the facts before it. It should be noted, however, that environmental protection is necessarily a universal concern. Whereas an action affecting the public lands in California may have a direct impact upon those who regularly use and enjoy the lands, it may have a less direct but no less important impact upon those who are merely potential users or who merely "enjoy" the lands though they do not visit them.[32]

The decisions that have applied the *Church of Christ* principles seem to follow, at least implicitly, the two tests identified by the District of Columbia Circuit—namely, that the challenged actions must be prima facie inconsistent with some public interest and that the organization must show it is a responsible and representative spokesman for that interest. The key question, of course, is whether the particular organization before the court is an appropriate one.

---

[32] See Darling and Eichhorn, *Man and Nature in the National Parks*, Conservation Foundation, p. 20 (2d ed. 1969), quoted in note 69 *infra*.

The factors that enter into that determination are similar to the considerations discussed above in terms of injury to a group's demonstrated interests. Indeed, many of the cases that accord standing to organizations do so on both grounds—that its own interests are injured and that it represents the concerned public—or on an indistinct mixture of the two. This is because a group that has a clear commitment to values such as environmental protection is likely as well to be representative of the interests of the general public in those values. In addition to the considerations enumerated above—age, local activities, resources, etc.—the courts may consider whether the organization has "roots in the community," whether it has undertaken the burdens of administrative or judicial litigation, and whether the organization may be the only spokesman willing or able to bring the issues before the court. See *Church of Christ,* 359 F.2d at 1004-05; *Citizens Committee,* 425 F.2d at 103.

These standards would surely be met in this case. First, the actions challenged—the allegedly unlawful approval of a mammoth ski resort in Sequoia National Forest and of an access highway through Sequoia National Park—are, if beyond the authority of federal officials, clearly inconsistent with the public interest. While the most directly affected individuals might be a rather circumscribed class, such as users of the park or forest, all citizens have a stake in the lawful management of the nation's public lands. Second, the Sierra Club certainly would qualify as a responsible and representative spokesman for the interests of either of these publics. During its 80 years of existence the Club has built a reputation as an unwavering advocate for conservation and sound maintenance of our nation's forests and parks, and has traditionally shown a special interest in the Sierra Nevada Mountains.[33] Its large, national membership assures it of sufficient resources to present its position vigorously, and gives

---

[33]The Sierra Club was, in fact, instrumental in expanding the boundaries of Sequoia National Park. See Pet. Br., p. 30 n.3.

it roots in the community of those concerned about our natural environment. The Club has consistently expressed its views in formal litigation as well as through informal administrative channels. It has shown, by its active efforts to block the Mineral King project at the administrative level (see A. 26) and by its undertaking of this federal litigation, that it is willing to shoulder the burdens of challenging at every step action that it considers unlawful and unwise. Nor has any more appropriate spokesman come forth. Indeed, if the Sierra Club cannot represent the interest of the public in this case, the issues it seeks to raise may never reach the attention of the courts.[34]

The Ninth Circuit did not address itself explicitly to the *Church of Christ* tests for standing, except to distinguish the case evidently on the ground that the public interested in environmental protection, unlike the public interested in sound broadcasting policy, is not entitled to representation by organizations:

---

[34] One whose standing is as spokesman for the public interest is commonly called a "private attorney general." The phrase is, however, of much narrower origin, and we have avoided its use in this section of our brief in order to minimize confusion. It evidently was coined by Judge Frank in *Associated Industries, Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), a case in which an association of industrial and commercial firms that were substantial consumers of coal were accorded standing to challenge an administrative order increasing the price of bituminous coal. The issue was not whether the plaintiff had a stake in the outcome but whether the Congress had provided for judicial review at the instance of one who was injured but who could show no "invasion of any private legally protected substantive interest of his own." 134 F.2d at 705. The court held that Congress had made such provision in a statute authorizing a "person aggrieved" by the administrative determination to seek review of it. The decision followed this Court's similar holding in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The *Sanders-Associated Industries* "person aggrieved" doctrine, which was applicable only if there was a "person aggrieved" statute, has, in effect, evolved to the *Data Processing* "zone-of-interests" standard. 397 U.S. at 154.

> "The *United Church of Christ* case, supra, was one of a number of consumer cases. There the FCC had denied to petitioners the right to intervene and, as listeners to the programming of a radio and television station, to present their views in a proceeding to renew the license of that station. In that case as in other consumer cases, the court pointed out that the listeners were the persons 'affected' or 'aggrieved.' They had standing in the same sense that coal consumers were found to have standing to review a minimum price order or that a transit rider had standing to appeal a fare increase." 433 F.2d at 30.

We cannot see that consumers of the scenic beauty and recreational facilities of public lands are less affected by unlawful actions concerning those lands than are consumers of television programming, coal, or public transit. See *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d at 1096-97. It seems plain that, if the *Church of Christ* approach is to be credited at all, it must have application in the case of conservation litigation.

4. *The Ninth Circuit's fears are unfounded.* The Ninth Circuit's opinions in this case and in *Alameda Conservation* express a clear reluctance to open the courts to groups like the Sierra Club. This reluctance is evidently grounded in several considerations, each of which we believe worthy of brief comment.

Judge Trask, writing for the majority in *Sierra Club* and *Alameda Conservation*, seemed concerned that the normal functions of government might be disrupted if environmental or other organizations were permitted to invoke the jurisdiction of federal courts. Thus, in *Sierra Club,* he stated his view that the Sierra Club's interest was not "sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and constitutional authority." 433 F.2d at 30. In *Alameda Conservation,* the view was made somewhat more explicit. Organizations were denied standing because:

> "Were it otherwise the various clubs, political, economic or social now or yet to be organized, could wreak havoc with the administration of government, both federal and state." 437 F.2d at 1090.

We are not sure precisely what the court had in mind. To the extent these passages reflect a view that the actions of the Secretaries are in some sense immune from judicial review, we believe the point is answered by the recent decisions of this Court. It is, as we show in a later section, a rare case indeed when administrative action is unreviewable. To the extent the passages reflect a fear that the courts will be inundated by all varieties of litigious organizations, we consider the fear unfounded. The courts have consistently minimized the danger that liberalized standing rules will lead to inundation of the judicial dockets. As the court in *Scenic Hudson* put it:

> "We see no justification for the Commission's fear that our determination will encourage 'literally thousands' to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries v. Ickes, * * * noting that 'no such horrendous possibilities' exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." 354 F.2d at 617.

To the same effect, see *Church of Christ*, 359 F.2d at 1006; *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970). Moreover, granting standing to organizations may well decrease rather than increase the burden on courts, since "[r]epresentation of common interests by an organization * * * serves to limit the number of those who might otherwise" bring actions. *Scenic Hudson*, 354 F.2d at 617.

To the extent the Ninth Circuit was concerned that the lawful activities of the government would be disrupted by obstructive lawsuits, its concern seems misdirected. Conferring standing upon a group asserting legitimate interests

results in interference only with administrative actions of doubtful legality, since if those actions are obviously lawful the government can move successfully for dismissal or for summary judgment. The problem of obstructive lawsuits is appropriately solved not at the courthouse door but in the courtroom itself, for the "doctrine of standing was never intended to provide a shield for official illegality."[35]

Judge Merrill, in his concurring opinion in *Alameda Conservation*, noted an additional concern. In his view, if an action is brought by an organization in circumstances where the "rights of its members are not tendered for adjudication" (437 F.2d at 1097-98), an adverse judgment would not bind the members and therefore would free them to "relitigate so long as imaginative counsel can find an escape from *stare decisis*." *Id.* at 1098. This problem, if it is a problem, is by no means unique to litigation by groups. If an *individual* whose property was to be damaged by the Mineral King project had brought an unsuccessful action to enjoin it, other individuals similarly injured would have been equally free to retain imaginative counsel and to relitigate the issue.

Beyond that, however, the courts are not powerless to deal with the threat of subsequent relitigation. The Court of Appeals for the District of Columbia Circuit recently considered the problem and suggested that where the plaintiff is an association the district court might appropriately entertain the defendant's request that the suit be designated a class action. *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971.)[36] This is precisely the procedure followed by the

---

[35] *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971).

[36] The court stated:

> "An organization that is a sufficiently effective spokesman for the interests of its members to assure an adversarial presentation of the issues has standing to present their views even though the action is not brought under Rule 23. * * * But the court that holds itself open to an organization that seeks

court in *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971), where in order to foreclose the "threat of harassment through consecutive lawsuits" the court granted the motion of a private defendant to require the plaintiffs to proceed under Rule 23.

In sum, most courts have not let predictions of dire consequences deter them from according standing to those who are likely to present a dispute in an adversary context. The experience of these courts has not been unsatisfactory. While conservation groups and other organizations have frequently been granted standing, we know of no instance of harassing relitigation or of inundation of the dockets or of obstructive lawsuits that can be attributed to liberalized standing rules.

C. Zone of Interests

If, as we believe we have demonstrated, the Sierra Club has a sufficient stake in the outcome of this controversy, it must still pass the second test for standing: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. This formulation was altered in *Investment Company Institute v. Camp*, 39 U.S.L.W. at 4407; but, as we shall explain, the alteration was expansive rather than restrictive. Under either formulation it is clear that the test presents no barrier to the Sierra Club's standing.

1. *The Data Processing formulation.* In both *Data Processing* and *Barlow*, the Court looked to the relevant statutory provisions and their legislative history for some indication of a Congressional intent to protect the interests of the

---

access to pre-enforcement review on behalf of its members, has discretion to determine that the Government's request for protection of its interests warrants an insistence that this representative suit be maintained as a class action." Slip opinion, pp. 27-28.

complainants' class. In *Barlow*, the statutes and their history expressly directed the Secretary of Agriculture to protect the interests of the tenant farmers. 397 U.S. at 164-65. While there was no such explicit language in the *Data Processing* statutory materials, "their general policy [was] apparent; and those whose interests [were] directly affected by a broad or narrow interpretation of the Act [were] easily identifiable." 397 U.S. at 157.

The statutes relevant to the claims made by the Sierra Club are those governing the management of the public lands in question. These, like the statutes in *Barlow*, evince a clear intent to protect the interests sought to be protected by the Sierra Club—that is, the public's interest in "conservation and sound maintenance" of the public lands in question. With respect to Sequoia National Park, the relevant statutes are the Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. § 1; the Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. § 41; and the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. § 45b. The first, which created the National Park Service as an entity within the Department of the Interior, directs that the Service shall promote and regulate the use of the national parks in conformity with their fundamental purpose,

> "which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The latter two statutes, which deal specifically with the lands within Sequoia National Park, dedicate the park "for the benefit of the people" and direct the Secretary of the Interior to administer the park to assure

> "the freest use of said park for recreation purposes by the public * * * and for the preservation of said park in a state of nature so far as is consistent with the purposes of sections 45a-45e of this title."

Similarly with respect to the forest lands, the Congress in the Multiple-Use Sustained-Yield Act of 1960, Pub. L. 86-517, 74 Stat. 215, 16 U.S.C. §§ 528-31, declared as its policy that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (§ 528), and directed the Secretary of Agriculture to "administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (§ 529). Among the considerations that must be taken into account, are "the needs of the American people" and the necessity for

> "harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land * * *." § 531(a).

Likewise, the Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. §§ 475, 551, directs that the national forests be administered "to improve and protect the forest" and "to preserve the forests * * * from destruction."

It is plain on the face of these statutes that the Congress intended to protect the conservation interests of the public generally. Any member of the public seeking to protect those interests therefore falls within the "zone of interests." Even if some purpose could be discerned to protect a more limited class of persons, that class would presumably include at least those who have some special interest in furthering the objectives of the legislation. For all the reasons already discussed, the Sierra Club would qualify whether it be regarded as an organization dedicated to the preservation and wise use of the nation's natural resources or as a spokesman for individuals having such interests. There can, therefore, be no doubt that the interests asserted by the Sierra Club are arguably within the zone of interests to be protected by the statutes in question.

2. *The Investment Company test.* Even assuming, as we do not, that the Sierra Club fails to meet the zone of inter-

ests test, it would certainly satisfy the *Investment Company* reformulation of that test. The *Investment Company* Court's characterization of the *Data Processing* holding is revealing: "we concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." 39 U.S.L.W. at 4407. The effect of this change, as noted in Mr. Justice Harlan's dissent and as exemplified by the case itself, was at a minimum to make unnecessary a showing that the legislation's *purpose* was to protect the petitioner's interests. It is enough now that its *effect* is to protect those interests. Thus, as Mr. Justice Harlan pointed out:

> "[N]either the language of the pertinent provisions * * * nor the legislative history evinces any congressional concern for the interests of petitioners and others like them in freedom from competition. Indeed, it appears reasonably plain that, if anything, the Act was adopted despite its anticompetitive effects rather than because of them." 39 U.S.L.W. at 4412-13.

The Court nevertheless considered that, since the "Congress did legislate against the competition that the petitioners challenge" (*id.* at 4407), their standing was clear.

We consider it beyond challenge that the statutes referred to above reflect an obvious *purpose* to protect the public's interest in conservation and sound maintenance of the public lands in question, and that it is consequently unnecessary to apply the broader *Investment Company* standard. If that standard were nevertheless used, there could of course be no serious doubt that the acts challenged by the Sierra Club—namely, the approval of rights-of-way, construction, and operation of the access road through Sequoia National Park, and the issuance of permits for the occupation of Sequoia National Forest lands by the Mineral King project—were "arguably legislated against" by the Congress in the pertinent Acts. That is, Congress arguably foreclosed the construction of park roads that are not meant to serve park

purposes and arguably prohibited the issuance of permits for use of forest lands in excess of 80 acres for any one project. And the acts challenged are, as in *Investment Company*, the source of the injury asserted by the Sierra Club.

Under either formulation, then, the second standing test presents no obstacle to the Sierra Club's standing.

D. Reviewability

We come finally to the third *Data Processing* test—"whether judicial review has been precluded." This standard is grounded in the Administrative Procedure Act, 5 U.S.C. § 701(a), which permits judicial review unless some statute precludes it or the challenged action is committed by law to agency discretion.

Little need be said here. This Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), established the principle, reiterated in *Data Processing* and *Barlow*, that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." With respect to statutes that may be thought to preclude such review, a clear command, or a command inferred from the statute's purpose, will suffice. *Barlow*, 397 U.S. at 167. But such an inference requires "a showing of 'clear and convincing evidence' of * * * legislative intent," *Abbott Laboratories*, 387 U.S. at 141, and where the zone of interests test has already been met this showing may be impossible. As the Court observed in *Barlow*, 397 U.S. at 167:

> "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized."

There has not to our knowledge been any suggestion in this proceeding, nor could there be, that any statute precludes,

on its face or by clear inference, judicial review of the actions challenged.

Though the Government urged in its briefs below that the actions of the Secretaries in approving the Mineral King project and the access road were, in effect, committed to their discretion by law, those briefs were written before this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287 (March 2, 1971). *Overton Park* held that the agency discretion provision "is a very narrow exception" to judicial reviewability, restricted to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 39 U.S.L.W. at 4290. We do not believe, in view of this conclusive statement, that the Government can or will renew its suggestion before this Court.

II

THE PARK HIGHWAY ISSUE

Beyond the issue of standing, of course, are the other issues that the Ninth Circuit resolved against the Sierra Club on the ground that it failed to establish a "strong likelihood" or "reasonable certainty" of ultimate success on the merits. We will deal with only one of these other issues: Whether the Secretary of the Interior acted within the scope of his statutory authority when he sanctioned the use of a 9.2 mile strip of land in Sequoia National Park for construction of an access highway to the proposed Mineral King recreational development to the east of the park.[37]

Respondent's case stumbles at the threshold. The Administrative Procedure Act, 5 U.S.C. § 706 (Supp. V), calls for

---

[37] Petitioner has attacked the Secretary's action on the additional grounds that he failed to observe requirements to hold a hearing and to make formal findings on the ecological impact of the road. However, we have confined ourselves to an argument that, whether or not there were any such additional requirements, the Secretary acted in excess of his statutory authority.

judicial review of agency action on the "whole record" compiled by the agency. There is no reason to believe that the record placed before the lower courts, and now before this Court, satisfies that requirement. It consists only of the pleadings, supporting legal memoranda, litigation affidavits, and certain exhibits assembled by the Sierra Club. Whether anything is missing we do not know, but it surely would be remarkable if without discovery the Sierra Club was somehow able to obtain all documents utilized by the Department of the Interior (hereinafter referred to as "the Department") in connection with its road approval action. However that may be, this Court has now made it clear that the complete agency record—while required as a minimum condition—will not be deemed an adequate record for review unless it contains materials that disclose the factual and legal basis for the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287, 4992-93 (March 2, 1971).[38] Since judicial review is directed at the action itself rather than at later explanations of that action, the record should ideally consist of materials that were actually before the decisionmaker, reflecting his contemporaneous appraisal of the evidence and understanding of his statutory authority. If such materials are not available—and here again we know only that they are not part of the record—the preferable method of securing the right to effective judicial review is to order an examination of the decisionmakers themselves, although the preparation of formal findings may possibly suffice despite the fact that they are retrospective and "thus must be viewed critically." *Id.* at 4293.

If the Secretary's actions with respect to the Mineral King Highway are reviewable at all—and as already noted the holding in *Overton Park* seems to us to dispose entirely of

---

[38]In *Overton Park*, as in this case, agency action was challenged by motion for a preliminary injunction. See *Citizens To Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1309 (6th Cir. 1970).

any doubt that may have existed on this score—the most that respondent can reasonably expect is an opportunity at a trial on the merits to present a proper record showing the basis of the Secretary's actions.

A. The Statutory Context

The Act creating the National Park Service defined the purposes for which national park lands were to be administered as follows:

> "The service thus established shall promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

This statement of purposes, enacted in 1916, 39 Stat. 535, and reinforced by the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20 (Supp. V)[39]—declaring a policy of Congress

[39]In its entirety this section provides:

> "In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas."

that "public accommodations, facilities, and services" in the parks "shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park areas in which they are located"—obviously confers broad powers on the Secretary of the Interior (hereinafter referred to as "the Secretary"), acting through the Director of the National Park Service (hereinafter referred to as "the Service").[40] But it also expresses, by the clearest implication, a limitation on that power. If land within the national park system, required to be administered under the principles set forth in 16 U.S.C. § 1, is committed by the Interior Department for some purpose other than "to conserve the scenery and natural and historic objects and the wild life therein" or "to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (hereinafter referred to as "park purposes"), then in our view the action must be set aside as unauthorized. We doubt that the government seriously disagrees with this view, for at no stage of these proceedings has it pointed to any statutory provision indicating that the park purposes established by 16 U.S.C. § 1 are not exclusive of all others, and its lame suggestion that the Department is free to depart from these purposes in the administration of Sequoia National Park collapses at the touch.

Our contention in connection with the Department's threatened final approval of the 9.2 mile segment of the proposed Mineral King Road (California Route 276) that passes through Sequoia National Park is that such approval would exceed the scope of authority conferred by 16 U.S.C.

---

[40]See *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 187 n.1 (1968), for recognition of the legal identity of the Director and Secretary in matters of national park administration.

§ 1.[41] Neither in fact nor in intention would the threatened action serve the dual purposes—preservation and public enjoyment—for which the Congress has decreed that national parks be managed. If some new purpose—in this case the provision of road access to a commercial development outside the park—is now to be added as a guide to land use decisions affecting the national parks, new legislation will surely be needed to accomplish the change. It will be needed, that is, unless the Department can somehow, on an augmented record, sustain a conclusion that on this record it has never shown to be true, much less shown to have been the basis for agency action—that Sequoia National Park, or the experience offered to visitors within the park, will be enhanced by the construction of a modern high-speed road designed to carry 1,200 cars per hour back and forth between the California State highway system on the west and a private year-round resort development on the east.

We note by way of further preliminary comment, not because we think confusion is likely to arise on the point but rather to avoid any possible misunderstanding of our argument, that—with the exception of areas set aside under the provisions of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36[42]—the Department does not operate under a stat-

---

[41] According to the litigation affidavits filed by the government as attachments to its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction (R. 205-27), the Secretary on November 19, 1968, did in fact approve in principle the use of a corridor through Sequoia National Park for the access road. Issuance of the special use permit authorizing actual construction of the park segment of the road, however, was withheld pending agreement on design standards. See McLaughlin Affidavit, ¶¶ 3-6 (A. 181-82); Deffebach Affidavit, ¶ 8 (A. 161-62).

[42] The Wilderness Act defined the characteristics of a wilderness area, 16 U.S.C. § 1131(c), and required the Secretary, within ten years after September 3, 1964, to review "every roadless area of five thousand contiguous acres or more in the national parks," and to report his recommendations on the suitability of such areas for preservation as wilderness. 16 U.S.C. § 1132(c). On those areas thereafter

utory mandate to maintain the national parks in a pure state of nature, free of all intrusions in the form of roads or other public facilities and accommodations. To be sure, the directive in 16 U.S.C. § 1 that national parks be administered so as to "conserve the scenery and the natural and historic objects and the wild life therein" must mean that wilderness values are a constant and inevitably important concern in all national park planning. But at the same time the Department has a statutory responsibility under 16 U.S.C. § 1 to promote the use of the parks and to provide for their enjoyment by the public—with the significant qualification, however, that means selected to this end must be such "as will leave them unimpaired for the enjoyment of future generations." So far as one can divine the legislative intent from the statutory language, the responsibility relating to public use and enjoyment, as qualified, is of coequal rank with the responsibility of conserving scenery, objects, and wild life.

Quite obviously, or so it appears to us, there is tension between these two responsibilities. To the extent that the duty to promote the use and provide for the enjoyment of the parks may require the construction of permanent facilities (such as the roads, lodges, and restaurants commonly found within the parks),[43] the preservation interest cannot

---

accorded wilderness status by Act of Congress, "there shall be no commercial enterprise and no permanent road." 16 U.S.C. § 1133(c).

On April 28, 1971 the President transmitted to the Congress a proposal to add 14 areas to the National Wilderness System. 7 *Weekly Compilation of Presidential Documents* 694 (May 3, 1971). One of the proposed additions is an area of 721,970 acres in Sequoia National Park and contiguous Kings Canyon National Park. However, while this area includes portions of Sequoia National Park both to the north and south of the Mineral King Road, it does not include the portion of the park in the immediate vicinity of the roadway.

[43] 16 U.S.C. § 3 authorizes the Secretary of the Interior to grant privileges, leases, and permits, for periods not exceeding thirty years, for the use of land for the accommodation of visitors in the various national parks. Since the government relies on this section as a

be fully served. Similarly, if an area is to be preserved in a natural state, opportunities for public use must to some extent be sacrificed. We are willing to concede that the task of balancing these interests—preservation and use—is the necessary business of national park management. So long as the balance is struck in some reasonable way—that is, so long as account is taken of the relevant considerations and so long as the Department does not entirely foreclose public use for the sake of preservation or destroy in the name of public use the natural values it is obliged to preserve—we are willing to concede that large measures of discretion are available to the Department and that its actions are subject to review only on the narrow grounds prescribed by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (Supp. V).[44] If, for example, in the Department's considered judgment an additional road were needed in one or another of the parks, either to handle an increasing volume of traffic or to create motor access to a new area within the park, the decision to build—assuming a proper articulation of reasons—could be sustained under the general authority contained in 16 U.S.C. § 1, as implemented by the specific authority relating to park roads contained in 16 U.S.C. § 8.[45]

We agree, then, that the Department administers the national parks under broad guidelines that permit a wide range of choices between competing interests of preser-

---

source of authority for the Secretary's road approval action, we will discuss its relevance later.

[44]This provision directs the reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[45]This provision, about which we also shall have more to say later, authorizes the Secretary to "construct, reconstruct, and improve" roads within the national parks. Like 16 U.S.C. § 3, see note 43 *supra*, this provision simply translates into concrete terms the general authority granted by 16 U.S.C. § 1 to promote the use and provide for the enjoyment of the national parks.

vation and use, and that under some circumstances the construction of roads within the parks is a permissible activity. However, these propositions are of no aid to the Department where, as we contend and will now show, it proposes to authorize the construction of a road not for the purpose of promoting the use and enjoyment of the park itself but for the purpose of providing a high-speed connection between points lying outside the park. Cast in terms of the legal issues on which the reviewing court is directed to focus by the Administrative Procedure Act, 5 U.S.C. § 706(2)(C)(Supp. V),[46] our contention is that the Department is acting outside the scope of its statutory authority when it compromises the preservation of a national park in its natural state for the purpose of providing road access to a commercial development outside the park.

We will first demonstrate that, so far as the matter is disclosed by the record developed in these proceedings, the sole purpose of the proposed California Route 276, including the 9.2 mile segment cutting through Sequoia National Park, is to service the planned Mineral King project in the game refuge area of Sequoia National Forest to the east of the park. We will then deal with the various arguments advanced by the government, and accepted by the Ninth Circuit in its very brief discussion of the road issue, 433 F.2d at 36, in supposed justification of the decision to permit construction within the park—namely, that the proposed road will produce the incidental benefit of increased park visitation by the public, that the proposed road is simply an "improvement" of the existing road, and that the Secretary's authority to administer designated public lands can reasonably be construed as empowering him to grant whatever road permits he sees fit.

---

[46] This provision directs the reviewing court to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

B. Approval of the Road Was Not Based on Any Legitimate Park Purpose

With regard to the purpose of the road, the District Court made the following finding of fact:

> "In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the park to reach an ultimate destination outside the Park—the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area." A. 194.

The materials available to the District Court would have warranted no other finding. On the Sierra Club side, the relevant materials included the complaint for injunctive relief asserting that the construction of the road would destroy or adversely affect scenery and other natural values within the park and that its sole purpose was to service the Mineral King development (A. 8), supported by an affidavit of the organization's Conservation Director asserting that the routing through the park was not a proposal of the Service and in fact had been opposed for several years by the Department (A. 36-37). To the affidavit were annexed numerous exhibits. One of these was a letter from the Acting Assistant Director of the Service stating:

> "It was with great reluctance that Secretary Udall agreed with Secretary of Agriculture Freeman that the access to Mineral King would be by a road through a portion of Sequoia National Park." A. 139[47]

---

[47] We think the same reluctance is expressed in the correspondence between these Cabinet officers attached as exhibits to the McCloskey affidavit (A. 136-37). For example, in his letter of October 6, 1968, to the Secretary of Agriculture, the Secretary of the Interior stated:

> "In addition to our desire to minimize the damage to park values by this road, we are concerned about what we have been told concerning the size of the planned Disney develop-

Among the other exhibits were a memorandum from the State Highway Engineer to the California Highway Commission (A. 54-56),[48] with an attached *Report of Route Studies* (A. 57-73), and a *Report on Road to Mineral King* (A. 140-57) prepared by the Clarkson Engineering Company at the request of the Service, all of which clearly identify access to Mineral King as the purpose of the road[49] and all of which conspicuously fail to suggest that park values would be enhanced by the road.

---

ment. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?"

One reasonable construction of this letter is that the Secretary viewed it as a discharge of his statutory responsibilities if, in the course of approving a project that served no park purpose, he took steps to minimize the consequential damages to park values. Such a construction obviously could not be squared with the mandate of 16 U.S.C. § 1, or with the policy expressed in 16 U.S.C. § 20 that improvements be authorized only when "necessary" for public enjoyment of the national parks.

[48]The segment of road within the park was to be constructed and maintained by the State of California. It was to be part of State Route 276, which was added to the State highway system by a 1965 act of the California legislature. See Deffebach Affidavit, ¶ 3 (A. 161).

[49]The memorandum states (A. 54):

"The highway will provide access to the proposed $35 million recreational complex at Mineral King* * *."

The route study attached to the memorandum states (A. 58):

"The route is to be developed as an all-weather highway to provide access to the proposed $35 million recreational complex at Mineral King* * *."

The report commissioned by the Service states (A. 140, 143):

"The California State Highway Department proposes to build a two-lane, two-directional road across the National Forest and National Park lands to service the proposed recreational developments in the Mineral King Canyon."

* * * * *

"The primary purpose of the proposed highway is to serve the Mineral King development."

On its side, with its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, the government submitted several affidavits. The only representative of the Department among the affiants was John McLaughlin, Superintendent of Sequoia National Park. He did not even assert in his affidavit that the proposed highway would serve a park purpose, let alone that such a purpose motivated the approval decision at the time it was made.[50] Nor did he deny that for several years the Department opposed the park routing, or explain the considerations that were taken into account when the routing was approved. To the contrary, he blandly confirmed that park space was to be surrendered to nourish with customers a commercial enterprise outside the park:

> "That in connection with the said development [Mineral King], it is planned that an all-year access highway over 9.2 miles of the land in the Sequoia National Park will be constructed * * *." A. 181[51]

It was only in its legal argument, when it was free to rationalize the Secretary's decision in terms of how it might have been reached rather than how it was reached in fact, that the government introduced the concept of incidental park benefits:

---

[50]The affidavit did assert that the construction of the road would be subject to standards "that will protect the National Park values" (A. 182). But this assurance, meaningless in any event in the absence of some definition of the Superintendent's idea of "National Park values," missed the point. The question was not whether the manner of construction would meet design standards relating to roadbuilding within the parks (see *Park Road Standards*, Department of the Interior, National Park Service, May 1968), but whether the road itself would further a park purpose.

[51]Needless to say, the other affiants made no mention of any park purpose. For example, the representative of the California Division of Highways simply asserted that in connection with the Disney project it was "necessary" to build the road. Deffebach Affidavit, ¶ 3 (A. 161).

> "Admittedly, one of the purposes of the new road will be to provide access to Mineral King. At the same time, however, the road will permit greater use of the national park itself and connections in the park will be provided in aid of permitting easier park access. Whether the road will affect the beauty of the park is a question of opinion which must be left to the Secretary's judgment. Certainly, the benefits of the road to the general public justify its construction as well as the conclusion that this national park segment should not be permitted to blockade public use of the adjoining forest lands. As noted previously, Congress has indicated its intention that public lands should be administered under the multiple use principle." R. 219.[52]

We will turn back to this argument in a moment. We simply note here the absence of any allegation that the Secretary's approval decision was taken to secure a park purpose. Rather the allegation is that in the process of serving an unrelated purpose, the road would also permit more intensive use of the park by the public. So far as that kind of analysis goes, of course, a four-lane or a six-lane expressway might well have been better than the proposed two-lane highway. In any event there was obviously no alternative to the District Court's finding that the purpose of the road was not to serve the park but to serve a development on adjoining lands. The Court of Appeals did not disturb this finding. 433 F.2d at 36.

---

[52]Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 15 (R. 219).

C. The Secretary's Approval of the Mineral King Highway Cannot Be Justified on the Ground That It Would Create Incidental Park Benefits in the Form of Wider Public Use.

The government's argument in the District Court, quoted above, is just the sort of *post hoc* rationalization of agency action that this Court has consistently rejected as worthless where the action is challenged as being in excess of statutory authority. *Investment Company Institute v. Camp*, 39 U.S. L.W. 4406 (April 5, 1971); *Overton Park*, 39 U.S.L.W. at 4292; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The problem with such rationalizations is that by their nature they cannot illuminate the issues that are critically important to judicial review—whether the agency head was aware of the limitations on his statutory authority, whether he misconstrued or disregarded those limitations if he was aware of them, and whether he took account of relevant considerations.

It may well be true, of course, as the government urges, that in this case the Secretary reasonably could have concluded that it was desirable to promote greater public use of the southern panhandle of Sequoia National Park. But so far as can be determined from *post hoc* argument, it may equally be true that the Secretary never even considered the question of public use of the park, or that if he considered the subject at all he deemed it irrelevant, or that while he recognized its relevance he based his road approval decision on other, impermissible considerations, or indeed that he deemed it exclusively relevant and failed to consider preservation values. The same may be said of the government argument that the effect of the road on the beauty of the park "is a question of opinion which must be left to the Secretary's judgment." That is a fine theoretical proposition, but there is no evidence that the Secretary made that kind of judgment, much less what that judgment was or how it figured in the decision. And invoking the "multiple

use principle," while the phrase has the sound of substance and is no doubt meant to convey the impression that the Secretary performed some sophisticated land management function with which the courts ought not to interfere, is mere facade. Under 16 U.S.C. §§ 1 and 20, the economic health of private resorts organized for profit on adjoining lands is not one of the permissible "multiples" in national park planning.

Even if we assumed, which we do not, that there are some circumstances in which unexplained agency action can be defended on the ground that the Secretary self-evidently both understood the limits of his power and applied correct criteria to his decision, thus making inquiry on these issues superfluous, the defense would surely fail in this case. That is so because here, judging from the government's *post hoc* arguments, there are strong indications that the Secretary in fact misunderstood his statutory authority. And judging from other information that is available, there is at least some reason to believe that the Secretary may have reached a different decision on the road had he applied proper criteria.

On the point of the Secretary's view of his statutory authority, the government argued to the District Court that "the benefits of the road to the general public justify its construction as well as the conclusion that this national park segment should not be permitted to blockade public use of the adjoining forest lands." What this amounts to, as we see it, is a claim that the Secretary is free to sell out park interests when it seems to him that some more important public interest would thereby be helped along. If, as we have already suggested and show in more detail later, the Secretary has a legislative warrant to pursue park purposes only, then he has been guilty of a misconception that deprives his action of all validity. Should this contention not prevail, it is clear at a minimum that the Secretary was influenced in his decision by a non-park purpose—the servicing of the Mineral King project—and that fact alone is

sufficiently suspicious to make mandatory a judicial inquiry into his understanding of the limits of his discretion. Adding to the suspicion are the undenied allegations that the Department initially opposed park routing of the road and approved it only "with great reluctance."

A searching probe of the grounds of the Secretary's decision—which *Overton Park* requires—may well prove fruitful in other respects. The crush of vehicular traffic in the national parks is a known and growing problem. A Park Road Standards Committee was appointed by the Director of the Service in 1967 to study the problem, and its 1968 report was submitted to the Secretary with the Director's endorsement.[53] That report reflects considerable hostility to new road construction in the parks, as the following excerpts demonstrate:

> "The single abiding purpose of National Parks is to bring man and his environment into closer harmony. It is thus the *quality* of the park experience—and not the statistics of travel—which must be the primary concern."[54]
>
> * * * * *
>
> "Although, by an accident of history, the National Park concept reached its development stage at about the same time as did the automobile, there is no everlasting and indissoluble relationship between the two.

---

[53]The committee's report is contained in a Department publication, *Park Road Standards*, Department of the Interior, National Park Service, May 1968. The Director's letter forwarding the report to the Secretary appears at page 2 of the publication. It states:

> "If you are in agreement, I would like to make this report available for distribution to interested conservationists and park organizations, and to begin immediately implementation of its recommendations within the National Park Service."

(The pages of the publication are unnumbered, so we have numbered them ourselves designating as page 1 the page displaying the Director's Memorandum of September 8, 1967, appointing the Committee.)

[54]*Id.* at 6.

"But in some ways, the National Parks stand at the same crossroads as do the American cities—some of which seem on the verge of choking on their automobiles. Just as noise, congestion, and pollution threaten the quality of urban life, they have begun to erode the quality of the park experience.

"Many park roads are now congested, particularly around points of great interest; others have a predictably brief grace time.

"There is no reason to expect that the construction of a new park road, by itself, will always relieve this congestion.

"The effective size and capacity of the parks is diminished or expanded by the means of access. Paul Brooks put it this way:

> 'If you are in a canoe traveling at three miles an hour, the lake on which you are paddling is ten times as long and ten times as broad as it is to the man in a speedboat going thirty—every road that replaces a canoe paddle, shrinks the area of the park.'

"In many locations it is impossible to construct roads—of whatever standard—without damaging, enduring scars and obstructing the natural movement of wildlife."[55]

* * * * *

"When the Service is faced with a choice between creating a severe road scar in order to bring visitors to a destination point, or requiring visitors to walk a considerable distance—or considering an alternate transportation system—the decision should be against the road scar.

"It is quite possible that, at this point in the history of National Parks, new roads should be considered the last resort in seeking solutions to park access."[56]

* * * * *

---

[55] *Id.* at 6.

[56] *Id.* at 7.

"Inevitably, if the park experience is to maintain its distinctive quality, the numbers of people and their methods of access and circulation will necessarily have to be more closely controlled."[57]

* * * * *

"Today the facts are these: unless an open-end-road road-construction program were to be carried out, the National Parks cannot indefinitely accommodate every person who wants to drive an automobile without restriction through a National Park."[58]

* * * * *

"People need also to appreciate that the purposes of park roads are completely different from those of the Federal and State systems. *Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.*"[59]

The Director of the Park Service has himself been reliably quoted as saying:[60]

"We have been building roads so visitors can drive 45 to 65 miles an hour. I don't think you can have a quality park experience at that speed.

---

[57] *Id.* at 8.

[58] *Id.* at 9.

[59] *Id.* at 9 (emphasis added).

[60] Cahn, *Will Success Spoil The National Parks?*, Christian Science Publishing Society, p. 15 (1968). This publication is a reprint of 16 articles on the state of the national parks that appeared in the Christian Science Monitor between May 1 and August 7, 1968. The series won the 1969 Pulitzer Prize for National Reporting. In a forward to the the publication (page 1), the Director of the Service describes the series of articles as "the most penetrating and thoughtful analysis of the national parks currently available." The publication is regularly distributed by the Service.

> "The parks are not crowded with people, but with autos."

In the light of these statements, the government's argument that the proposed road might have been jusitified on the ground that it would "permit greater use of the national park itself" is even less convincing than usual *post hoc* rationalization. It is bad enough to have a record that is completely silent on the process of decision. But it is something else to have affirmative indications, based on comments by responsible agency officials, that had the Secretary even considered that "greater use" of Sequoia National Park was a proper objective,[61] he might well have concluded that a

---

[61] The number of visits made by the public to Sequoia National Park increased from 484,700 in 1954 to 919,300 in 1969. *Public Use Of The National Parks; A Statistical Report 1954-1964*, Department of Interior, National Park Service, p. 10 (1966); *Public Use Of The National Parks December 1969*, Department of Interior, National Park Service (1969), Table 2. We can only speculate about the bearing these figures might have on decisions to construct roads that would subject the park to more intensive public use. However, the materials that were before the District Court do disclose that the ecology of the park is fragile. See particularly Professor Hartesveldt's memorandum *Study of the Possible Changes in the Ecology of Sequoia Groves in Sequoia National Park to be Crossed by the New Mineral King Highway*, dated December 19, 1966 (A. 84-123), in which 45 giant sequoia trees are counted in the drainageways below the proposed road, and in which emphasis is laid on the shallow root structure and vulnerability to toppling because of erosion and soil shifting that is characteristic of these trees. See also the *Report on Road to Mineral King*, prepared by the Clarkson Engineering Company at the request of the Service, which states (A. 142):

> "Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.
>
> "More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park."

road was the wrong way to accomplish that objective, and that a road designed for 50 MPH speeds was a worse way still.[62]

D. The Proposed Road Cannot Be Justified on the Theory That It Is Simply an "Improvement" of an Existing Road.

We turn now to the Ninth Circuit's professed inability to find law or logic "in a contention that a twisting, substandard, inadequate road through 9.2 miles of park is legal but an improved all weather two lane highway along a new but approximately parallel alignment is illegal." In our view, this alchemic reasoning converts wholly irrelevant circumstances into controliing ones.

To the extent that the Ninth Circuit's reasoning may have been inspired by the thought that the new road would perform essentially the same function as the old road, only more efficiently, it involves a premise that is factually incorrect. The old road is a "very narrow" 25-mile stretch from

---

[62]It appears that roadbuilding decisions are ordinarily made in the context of a comprehensive plan for management of the park. See Bayliss, *Planning Our National Park Roads And Our National Parkways*, Traffic Quarterly, pp. 419-21 (July 1957):

> "All park development, including * * * the connecting road system, is controlled by the *master plan* for the park. This is a detailed, as well as narrative plan, which defines the theme or basic importance of the park, the areas to be developed and likewise those to be kept free from development, as well as the method of interpreting the important story or features."

This article identifies its author, Mr. Bayliss, as Chief of Parkways, Branch of Landscape Architecture, Division of Design and Construction, National Park Service.

We have found no reference in the record to a master plan for Sequoia National Park. Nor have we found in the record any other indication of an intention to develop the area of the park designated for the proposed road, except in connection with the Mineral King project. Indeed, it may be that a master plan exists showing that the area is among those "to be kept free from development."

Three Rivers on the west to Mineral King on the east, with sharp switchbacks and steep grades, with a surface of oiled dirt or in places only graded roadbed, and with an estimated average daily traffic load of 95 vehicles.[63] It is closed in winter. The proposed road—a 20.4 mile stretch—would connect the same points, but by a routing that would incorporate "very little" of the existing roadbed.[64] It would have two lanes of all-weather paving, covering a total width of 28 feet excluding the "frequent" passing lanes. It would have the capacity to handle 1,200 cars per hour in each direction, and by 1978 the average daily traffic flow in the peak summer months would be 9,850 vehicles. Estimated costs are $22 million for construction and $400,000 for rights of way. Clearly it is intended to do something more than tidy up the old road.

Again a factual misconception is involved if the thought was that the existing road evidenced some earlier judgment, entitled perhaps to continuing respect despite the scope of the planned construction, that the southern area of the park was suitable for mortorized use. The old road existed when Sequoia National Park was created in 1890 (A. 28),[65] and thus it is not the product of a judgment by the Service.

---

[63] For a description of the existing road, and the characteristics of the road proposed by the California Division of Highways, see *Report of Route Studies*, pp. 1-4 (A. 58-61). The proposal of the California Division of Highways was the one adopted by the Service (R. 180), even though an alternate routing proposal commissioned by the Service itself recommended that the corridor of the old road for the most part be followed, see *Report on Road to Mineral King* (A. 144-46). We note also that two means of highway access to Mineral King not involving a surface routing across the park—a tunnel underneath the park and a north-south road—were studied but apparently rejected by the Service on account of cost considerations. See *Report of Route Studies*, pp. 8-9 (A. 65-66).

[64] *Report of Route Studies*, p. 4 (A. 61). And see map attached to this report (A. 73).

[65] And see the government's concession on this point at page 12 of its Reply Brief in the Ninth Circuit.

Finally, if the Ninth Circuit's thought was that the existence of a seasonal dirt road somewhere in a park necessarily justifies a 50 MPH highway elsewhere in the park—or in the same place for that matter—there has been a misreading of the relevant statutes. What the authority to improve and construct roads conferred on the Secretary by 16 U.S.C. § 8 must mean, as we will show in a moment, is that the Secretary is free to do anything in the way of roadbuilding that serves the broad aims of national park administration set forth in 16 U.S.C. § 1. That is, whether or not an "improvement" is being made is a question that can only be answered in terms of park purposes. Were it otherwise, the Secretary could convert every dirt road in every park to speedways to meet transportation goals unrelated to preservation or enjoyment of the parks themselves—a result that would be inconsistent not only with 16 U.S.C. § 1 but also with the policy expressed in 16 U.S.C. § 20 that improvements should be restricted to those that are "necessary * * * for public use and enjoyment of the national park area in which they are located."

E. The Park Purposes Defined by 16 U.S.C. § 1 Are Exclusive.

The government's last-ditch argument is that the Secretary's judgment is supreme on questions of national park administration. We are not certain whether the notion here is that the Secretary's power is so sweeping that his actions are unreviewable, or that while reviewable they are never reversible on grounds that the limits of power were exceeded.[66] If the claim is immunity from review, we think

[66] The government argued in the District Court (Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 14, R. 218):

> "And since the Secretary of the Interior has the authority to administer these public lands, an authority delegated by the Congress, the question of whether the Secretary should or should not grant a particular road permit does not involve any issue of legality or illegality but merely one of discretion—and one where even the Secretary's motive would not create a basis for judicial review."

this Court's recent decision in the *Overton Park* case is a sufficient answer. Moreover, the cases principally relied on by the government, none of which relate to national park matters, all involved federal land-use decisions taken pursuant to reasonable—and, just as importantly, fully articulated—interpretations of the relevant statutes. Rather than burden the text with a discussion of these cases, we have collected them in a footnote along with others that do relate to national park matters but that the government did not cite.[67]

---

[67] In *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965), it was held that the Secretary of Agriculture may designate "primitive areas" within the national forests under a statute, 16 U.S.C. § 551, authorizing him to regulate the "occupancy and use" of such forests. *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966), upheld the authority of the Secretary of the Interior—whose action was based on a "thoughtful decision" construing the scope of the discretion conferred on him by Section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181—to refuse applications for oil and gas leases in the Kenai National Moose Range in Alaska. And in both *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965), and *Willcoxson v. United States*, 313 F.2d 884 (D.C. Cir.), *cert. denied*, 373 U.S. 932 (1963), the discretionary authority of the Secretary of Interior under the Isolated Tracts Act, as amended, 43 U.S.C. § 1171, as implemented by regulations, was found to be broad enough to warrant the refusal to consummate the transfer of public lands after soliciting competitive bids. See also *Thor-Westcliffe Development, Inc. v. Udall*, 314 F.2d 257 (D.C. Cir.), *cert. denied*, 373 U.S. 951 (1963), and *Safarick v. Udall*, 304 F.2d 944 (D.C. Cir.), *cert. denied*, 371 U.S. 901 (1962), sustaining the Secretary's construction of the Mineral Leasing Act.

And see also, relating to national park matters but not cited by the government, *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961 (1969) (upholding the Secretary's authority, under 16 U.S.C. § 3, to order the killing of deer in Carlsbad Caverns National Park in connection with studies relevant to management of the deer population in the park); *Udall v. Washington, Va. & Md. Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) (upholding the Secretary's authority to limit commuter bus traffic on George Washington Memorial Parkway); *Arthur v. Fry*, 300 F.Supp. 622 (E.D. Tenn. 1969) (upholding the Secretary's authority to prohibit the operation of commercial vehicles inside Great Smoky Mountain National Park).

The only conclusion we draw from these precedents—hardly a startling one but one nevertheless that the government appears to doubt—is that, while the operative statutes may create broad fields of discretion, the Secretary has never been regarded as absolute monarch of the public lands within his statutory domain.[68]

We come, then, to the specific provisions that are relevant to a determination of the Secretary's authority to approve the construction of roads in Sequoia National Park, 16 U.S.C. § 1, and, so the government urges, 16 U.S.C. §§ 3 and 8. As we have seen, 16 U.S.C. § 1, 39 Stat. 535, the legislation enacted in 1916 creating the Service, establishes broad policies of preservation and use as the guiding principles of national park administration.[69] Enacted as part of the same

---

At the same time, however, decisions of the Secretary of Interior concerning the disposition of lands under his management have frequently been set aside as contrary to the purposes of the legislation from which his authority was allegedly derived. See *Lane v. Hoglund*, 244 U.S. 174 (1917); *Moore v. Robbins*, 96 U.S. 530 (1887); *Barash v. Seaton*, 256 F.2d 714 (D.C. Cir. 1958); *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

[68]In this connection, we are not certain whether the Department can reconcile the inevitable use by commercial vehicles of the proposed Mineral King Highway with its own regulations, 36 C.F.R. §§ 5.6(b)-(c), which provide:

> "(b) The use of government roads within park areas by commercial vehicles, when such use is in no way connected with the operation of the park area, is prohibited, except that in emergencies the Superintendent may grant permission to use park roads.
>
> "(c) The Superintendent shall issue permits for commercial vehicles used on park area roads when such use is necessary for access to private lands situated within or adjacent to the park area, to which access is otherwise not available."

[69]In assuming that under some circumstances the Secretary may have a continuing mandate to create facilities for public use of the parks under the directive in 16 U.S.C. § 1 to provide for their "enjoyment," we may have assumed too much. See Darling and Eichhorn, *Man and Nature in the National Parks*, Conservation Foundation, p. 20 (2d ed. 1969):

legislation, 16 U.S.C. § 3 authorizes the Secretary to grant 30-year permits for certain uses of national park lands. Several years later, in 1924, the Congress enacted 16 U.S.C. § 8, 43 Stat. 90, authorizing the Secretary to "construct, reconstruct, and improve" roads within the parks. If, as we contend, the park purposes enumerated in 16 U.S.C. § 1 are exclusive, and the term permit and roadbuilding authority conferred by 16 U.S.C. §§ 3 and 8 is to be used only in furtherance and never in derogation of these purposes, then for the reasons we have already outlined the Secretary's approval of a park routing for the new Mineral King Highway is unlawful.

Before moving to our discussion of legislative history, three observations seem to us in order. First, we are dealing here with statutory provisions that, so far as concerns the limitations they impose on the Secretary's authority to construct roads on park lands, have never been the object of judicial scrutiny. Second, as best we can discover, the Department has, apart from the unacceptable *post hoc* rationalizations offered in these proceedings, never asserted the right to slice a highway corridor through a park to service an off-park location, or acted as though it possessed such authority. The doctrine whereby special deference is paid in resolving problems of statutory construction to an agency's understanding of its own authority, see *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Mineral Leasing Act of 1920), and *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S.

"[I]n a time when the population is expected to increase considerably, along with leisure time and technical ability in moving over remote country, we are bound to ask whether the parks are to be considered as expendable assets, and what kind of enjoyment of national parks will be available for posterity. It is our belief that many people 'enjoy' the parks although they do not visit them. The very fact that such preserved areas exist is a matter of immense satisfaction to people who take the view that nature exists in her own right and that it is the duty of reflective man, with his dominance over the planet, to conserve the areas represented by national parks for the reasons they were chosen for that dignity."

309, 318 (1958), is for this reason wholly inapplicable. See *Investment Company Institute v. Camp, supra,* 39 U.S.L.W. at 4409 (refusing to apply the doctrine under similar circumstances on the ground that a *post hoc* rationalization of agency action during litigation is "hardly tantamount to an administrative interpretation"). Third, the Congress could fairly be charged with creating an odd statutory scheme indeed if it started out with a statement of "fundamental purpose" of national park administration, see 16 U.S.C. § 1, and then went on, without indicating it was doing so, to authorize the Secretary to issue permits and build roads within the parks for unrelated and conflicting purposes. A strong showing of legislative intent should be required before it is supposed that the Congress proceeded in a manner so awkward and so apt to generate confusion, and—at least thus far—the government has made no showing whatever of legislative intent.

During the early years of this century, public use of the 13 existing national parks started to mount sharply. H. Rep. 700, 64th Cong., 1st Sess., p. 5 (1916).[70] As the then Secretary of Interior Franklin Lane explained in a letter to the Chairman of the House Committee on Public Lands, adequate administrative machinery to handle the influx of visitors was not in place. The parks were being managed as independent entities, by officials burdened with other duties and lacking in expertise, under laws that the Secretary described as "not uniform."[71] *Id.* at 6. The legislative

[70] For example, the report indicates that in Sequoia National Park the number of visitors increased from 1,251 in 1908 to 7,647 in 1915. These figures compare with the 919,300 visits that the park received in 1969.

[71] Sequoia National Park itself was established by an Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. §§ 41, 43. The Secretary was directed by this legislation to "provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. § 43. When the boundaries of Sequoia National Park were revised in 1926, 44 Stat. 818, 16 U.S.C. § 45a, the Secretary was directed to:

response, embodied in H.R. 15522, 64th Cong., 1st Sess. (1916), was a proposal to create a central administration for the parks—and also for the several existing national monuments, some of which were then under the jurisdiction of the Secretary of Agriculture and two of which were under the jurisdiction of the War Department—to be known as the National Park Service. The "fundamental purpose" of park administration was defined by Section 1 of the bill, without change between its introduction and its final enactment as P.L. 64-235, in the precise terms that still remain in 16 U.S.C. § 1. Nowhere does it appear that the "fundamental purpose" was not intended as the only purpose. Certainly that does not appear from Section 3 of the bill, now 16 U.S.C. § 3, which merely provides the Secretary with a grant of authority to publish necessary regulations, to take certain actions protective of park values,[72] and to issue term permits

"make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as he may deem necessary or proper for the care, protection, management, and improvement of the same, such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the preservation from injury or spoilation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature so far as is consistent with the purposes of of sections 45a-45e of this title." 16 U.S.C. § 45b.

In our view, the legislative directives relating specifically to the administration of Sequoia National Park are restatements of the "fundamental purpose" of all the parks as defined by 16 U.S.C. § 1. We do not think they either expand or constrict the authority that the Secretary has with respect to the construction of roads generally, and 16 U.S.C. § 1—as well as 16 U.S.C. §§ 3 and 8—are fully applicable in the administration of any area in the national park system "to the extent such provisions are not in conflict" with other provisions specifically applicable to such area. 16 U.S.C.A. § 1c(b) (Supp. 1971).

[72]This section does authorize the Secretary to grant the privilege of grazing livestock within the parks where in his judgment such use would not be "detrimental to the primary purpose" of the parks. Even here, however, as the report of the Conference Committee on H.R. 15522 makes clear, grazing reduces the risk of fire and therefore affirmatively serves a park purpose. H. Rep. 1136, 64th Cong., 1st Sess., p. 2 (1916).

for "the use of land for the accommodation of visitors." Indeed we are surprised that the government should have made any attempt to bolster its case by reference to this provision, since unless a road is regarded as an "accommodation" for visitors—a strange usage that finds no support in the legislative history—the provision has nothing whatever to do with the construction of roads in parks.[73]

[73]In its Reply Brief in the Ninth Circuit (pp. 11-12), the government explained that the Department:

> "proposes to issue, under its discretionary management function in 16 U.S.C. Secs. 1 and 3, to the State of California a revocable special use permit for construction of a 9.2-mile road in this Park."

A copy of the special use permit that the Department proposed to issue was attached as an Appendix to the Reply Brief. It shows that the Department of Public Works, State of California, as permittee, was to be authorized to use the 9.2-mile strip of land in Sequoia National Park, containing 220 acres more or less, for the purpose of constructing and maintaining a "highway to Mineral King." The authorization was to cover the period from February 15, 1969 to February 14, 1989.

There are several things to be said about this proposed permit. First, it is not, as the government represents it to be, "revocable"—whatever that idea may mean in regard to permanent roads. Rather it is for a fixed term of 20 years. Second, it nowhere purports to be issued "for the use of land for the accommodation of visitors," which is the only use to which the permit procedure outlined in 16 U.S.C. § 3 applies. Third, the fact that it is to be issued for a 20-year term (rather than the allowable 30-year term prescribed for permits issued under 16 U.S.C. § 3) suggests that the Department was proceeding under 16 U.S.C. § 45b, which relates specifically to Sequoia National Park and which provides in part:

> "Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or persons or company for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors."

Obviously if the Department is proceeding under this provision—as indeed may be required since it is specifically applicable to Sequoia National Park and therefore should displace provisions relating to the parks generally, see 16 U.S.C.A. § 1c(b) (Supp. 1971)—the permit is unauthorized. By its terms it covers more than ten acres and does not pertain to "the erection of buildings for the accommodation of visitors."

While 16 U.S.C. § 8 obviously does have to do with the construction of park roads, contrary to the view of the Ninth Circuit it does not supply the Secretary with authority to approve a cross-park highway to Mineral King. Legislation containing this provision was introduced, as H.R. 3682, 68th Cong., 1st Sess. (1924), and enacted, P.L. 68-70, 43 Stat. 90, at the urging of then Secretary of Interior Herbert Work. It was not more authority that the Secretary was after—that subject was never even mentioned—but rather more money to build a road network adequate for growing park needs. In a letter to the Chairman of the House Committee on Public Lands, he noted that both parks and automobiles were becoming more popular,[74] that most park roads had been designed for horse-drawn traffic, that only meager appropriations had been made for improvements, and that there were only 12 miles of hard surface in the entire system. H. Rep. 258, 68th Cong., 1st Sess., pp. 2-3 (1924). What he sought—and what Section 2 of H.R. 3682 provided—was a $7.5 million authorization spread over three years to carry out a program of new construction and reconstruction of roads within the parks. Section 1 of the bill, which survived as 16 U.S.C. § 8 but attracted no notice on the way to its enactment,[75] was simply a prefatory statement of the work to be accomplished with the authorized funds. We do not see how a revenue authorization to build roads that would allow the public easier motor access to the parks

---

[74] Visitors in the parks and monuments, said the Secretary, had increased from 356,097 in 1916 to "the tremendous total of 1,493,712." An expanded system of parks and monuments received a total of 163,990,000 visits in 1969. *Public Use of the National Parks December 1969*, Department of Interior, National Park Service, Table 3A at p. 9 (1969).

[75] For example, in responding on the floor of the House to a request for an explanation of H.R. 3682, the Chairman of the Committee on Public Lands stated, 65 Cong. Rec. 4454:

> "[T]his bill merely provides for an authorization of an expenditure between now and June 30, 1927, at the rate of $2,500,000 for each fiscal year."

and motor circulation within the parks can now be brought forward as justification for a decision to use Sequoia National Park as a platform for a high-speed through route to Mineral King.

In sum, there is nothing at all in the legislative history of 16 U.S.C. §§ 3 and 8 to indicate that these provisions were intended to enlarge or modify the "fundamental purpose" for which 16 U.S.C. § 1 states that the parks are to be administered. And we have already seen that no such indication emerges from the judicial decisions on which the government relies. As one court put it: "Anything detrimental to this purpose is detrimental to the park." *New Mexico State Game Comm'n v. Udall,* 410 F.2d 1197, 1200 (10th Cir.), *cert. denied,* 396 U.S. 961 (1969). On the other hand, 16 U.S.C. § 20 manifests on the part of Congress both an awareness that heavy visitation by the public threatens to impair park values and a clear intention—one that the government has taken no cognizance of in these proceedings—that major alterations of park landscape should be undertaken only when "necessary" to provide for "public use and enjoyment of the national park area in which they are located." Whatever the full implications of this legislative policy may be, it surely rules out—or makes it evident that 16 U.S.C. § 1 itself rules out—road construction designed to promote the enjoyment of areas located beyond park boundaries.

F. Only Congress Can Authorize a Park Routing for the Mineral King Highway.

It may be that the Mineral King development complex would serve a public purpose of such overriding importance that an access highway, however destructive of park values, should be routed through Sequoia National Park. But that judgment is not the Secretary's to make. His statutory responsibility is to act in the interests of the parks, not to subordinate those interests to others according to his own

notions of public policy. Whether an area ought to be carved out of Sequoia National Park to serve a purpose unrelated to the preservation or enjoyment of the park itself is a judgment that only Congress can make.[76]

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals vacating the preliminary injunction should be reversed.

Respectfully submitted,

MARK L. EVANS
ANTHONY A. LAPHAM
DONALD S. BURRIS
PHILIP J. HARTER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

EDWARD LEE ROGERS
162 Old Town Road
East Setauket, N.Y. 11733

SHEA & GARDNER
Of Counsel

Attorneys for Amicus Curiae
Environmental Defense Fund

---

[76]We note that in 1958 Congress rejected a proposal to authorize the Secretary to exclude approximately 6,000 acres from Sequoia National Park in the vicinity of the Mineral King Road. This proposal appeared as Section 1 of H.R. 6198, 85th Cong., and was supported by the Department, but it was deleted by amendment in the House Committee on Interior and Insular Affairs. H. Rep. 1712, 85th Cong., 2d Sess., p. 2 (1958). At the same time the Committee approved, and the Congress enacted, P.L. 85-644, 72 Stat. 604, 16 U.S.C. § 45a-3, Section 2 of H.R. 6198, which authorized the Secretary to exclude 10 acres from Sequoia National Park, such land to be added to the game refuge area of Sequoia National Forest at the point where that area was intersected by the Mineral King Road. The purpose of this exclusion was to protect persons to whom cabin permits had been issued at a time, prior to an accurate boundary survey, when the 10 acres were thought to lie inside the national forest rather than the national park.